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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 1284

ANGELO PROCARIO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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TABLE OF CONTENTS

	PAGE
OPINIONS BELOW	2
JURISDICTION	2
QUESTIONS PRESENTED	3
CONSTITUTIONAL PROVISIONS INVOLVED	5
United States Constitution, Fifth Amendment	5
United States Constitution, Sixth Amendment	5
STATUTES INVOLVED	5
Title 26, United States Code, Sec. 7201	5
STATEMENT OF THE CASE	5
The failure of the courts below to direct a new trial or hold a hearing on the evidence of trial jurors' bias, prejudice and fear which was not disclosed on their voir dire examination	6
The courts below failed to direct a judgment of acquittal although concededly the prosecution had failed to investigate leads establishing petitioner's innocence	11
The vague and unreliable method of reconstructing income was a violation of due process	16
A. The bank deposit method	16
B. The admission by the prosecution that its reconstruction of income was uncertain	18
The complete fiscal defense was not rebutted	20
Error in excluding the prosecution's attempted spoiliation of evidence	20

PAGE

REASONS FOR GRANTING THE WRIT 24

1. A conviction after a trial where the jury was not impartial may not stand under the Sixth Amendment 24

2. The use of the "bank deposit method" below violated fundamental fairness and the constitutional guarantees of due process, of trial, and against self-incrimination 34

A. The bank deposit method of proving tax evasion 35

B. Safeguards necessary for the use of the bank deposit method in a criminal case ... 43

C. The prosecutor's admission that the bank deposit computation was erroneous 51

D. The Government's failure to traverse the assisting fee defense 53

3. The exclusion of attempts to intimidate defense witnesses 55

CONCLUSION 58

APPENDIX:

A—Opinion of the Court of Appeals 1a

B—Order of Affirmance 9a

C—Order Denying Petition for Rehearing In Banc 10a

D—Order Denying Petition for Rehearing and Motion to Stay Mandate 11a

E—Order Staying Mandate 12a

PAGE

Cases Cited

Aldridge v. United States, 283 U. S. 308, 51 S. Ct. 470 (1931) 24, 25, 33, 34

Alpirn, Estate of Morton, 18 T.C.M. 314 (1959) 39

Best v. District of Columbia, 291 U. S. 411, 54 S. Ct. 487 (1934) 52

Bostwick v. United States, 218 F. 2d 790 (5th Cir. 1955) 16fn, 43

Brown v. United States, 356 F. 2d 230 (10th Cir. 1966) 32fn

Bruno, Application of, M 11-188 (S. D. N. Y. 6/9, 23/64), Government's appeal withdrawn, Docket No. 29023 (2d Cir. 10/30/64) 2, 14fn, 21, 23, 55-57

Bryan v. United States, 175 F. 2d 223 (5th Cir. 1949) 19fn, 50, 53

Clark v. United States, 289 U. S. 1, 53 S. Ct. 465 (1933) 26, 29-31, 32fn, 33fn

Consolidated Gas & Equipment Co. of America v. Carver, 257 F. 2d 111 (10th Cir. 1958) 26, 31

Dennis v. United States, 339 U. S. 171, 70 S. Ct. 523 ... 26

DiBella v. United States, 369 U. S. 121, 82 S. Ct. 654 (1962) 48fn

Durbin v. United States, 221 F. 2d 520 (D. C. Cir. 1954) 24, 57

Fairchild v. United States, 240 F. 2d 944 (5th Cir. 1957) 16fn, 49

Flemister v. United States, 260 F. 2d 513 (5th Cir. 1958) 53

PAGE

Foman v. Davis, 371 U. S. 178, 83 S. Ct. 227 (1962).. 48

Frelbro Corp. v. C. I. R., 315 F. 2d 784 (2d Cir. 1963) 47

Friedberg v. United States, 348 U. S. 142, 75 S. Ct. 138 (1954)..... 36

Gleckman v. United States, 80 F. 2d 394 (8th Cir. 1935) 40

Graves v. United States, 191 F. 2d 579 (10th Cir. 1951) 40

Harvey v. United States, 215 F. 2d 330 (D. C. Cir. 1954) 57

Holland v. United States, 348 U. S. 121, 75 S. Ct. 127 (1954).....3, 12fn, 13-15, 36, 37, 38fn, 39fn, 43-51

Hood v. United States, 23 F. 2d 472 (8th Cir. 1927), cert. den., 277 U. S. 588, 48 S. Ct. 436..... 57

Hyde v. United States, 225 U. S. 347, 32 S. Ct. 793 1912) 31fn

Irvin v. Dowd, 366 U. S. 717, 81 S. Ct. 1639 (1961)..26, 32fn

Leonard v. United States, 378 U. S. 544, 84 S. Ct. 1696 (1964) 25

Lerew, John W., P. H., T. C. M. 1962-139..... 38fn

Lewis v. United States, 146 U. S. 370, 13 S. Ct. 136 (1892) 25

Marshall v. United States, 360 U. S. 310, 79 S. Ct. 1171 (1959).....26, 32fn

Mattox v. United States, 146 U. S. 140, 13 S. Ct. 50 1892) 25, 26, 31fn

McDonald v. Pless, 238 U. S. 264, 35 S. Ct. 783, 59 L. Ed. 1300 (1915).....28, 29

PAGE

McNabb v. United States, 318 U. S. 332, 63 S. Ct. 608 (1943) 37

Merritt v. United States, 327 F. 2d 820 (5th Cir. 1964), adhered, 329 F. 2d 757, 334 F. 2d 759...16fn, 19fn, 49, 53

Morford v. United States, 339 U. S. 258, 70 S. Ct. 586 (1950) 26, 32fn, 33

Oscanyan v. W. R. Arms Co., 103 U. S. 261 (1881)... 52

Percifield v. United States, 241 F. 2d 225 (9th Cir. 1957) 41

Photostat Corporation v. Ball, 338 F. 2d 783 (10th Cir. 1964).....26, 32

Powers, Jr., William J., 21 T.C.M. 17 (1962)....16fn, 44, 49

Remmer v. United States, 347 U. S. 227, 74 S. Ct. 450 (1954)..... 25

Remmer v. United States, 350 U. S. 377, 76 S. Ct. 425 (1956)..... 26

Richmond Television Corp. v. United States, 345 F. 2d 901 (4th Cir. 1965)..... 52

Romine, Ralph, 25 T.C. 859 (1956)..... 54

Rubenstein v. United States, 227 F. 2d 638 (10th Cir. 1955) 26, 31

Sansone v. United States, 380 U. S. 343, 85 S. Ct. 1004 (1965) 35

Semble, Merritt v. United States, 327 F. 2d 820 (5th Cir. 1964), adhered, 329 F. 2d 757, 334 F. 2d 759.. 16fn

Slavin, Arthur M., 43 B.T.A. 1100 (1941)..... 54

Small v. United States, 255 F. 2d 604 (1st Cir. 1958) 54

PAGE

Smith v. United States, 348 U. S. 147, 75 S. Ct. 194 (1954) 36

Swain v. State of Alabama, 380 U. S. 202, 85 S. Ct. 824 (1965) 25, 32fn

United States v. Alker, 180 F. Supp. 661 (E. D. Pa. 1959) 26, 32

United States v. Calderon, 348 U. S. 160, 75 S. Ct. 186 (1954) 36

United States v. Campbell, 316 F. 2d 7 (4th Cir. 1963) 33

United States v. Caserta, 199 F. 2d 905 (3d Cir. 1952) 53

United States v. Crosby, 294 F. 2d 928 (2d Cir. 1961) 28

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United States v. Frank, 245 F. 2d 284 (3d Cir. 1957) 16fn, 38fn, 41, 43, 44

United States v. Freundlich, 95 F. 2d 376 (2d Cir. 1938) 57

United States v. Fenwick, 177 F. 2d 488 (7th Cir. 1949) 16fn, 50, 53

United States v. Gainey, 380 U. S. 63, 85 S. Ct. 754 (1965) 41

United States v. Johnson, 319 U. S. 503, 63 S. Ct. 1233 (1943) 52

United States v. Kum Seng Seo, 300 F. 2d 623 (3d Cir. 1962) 32fn

United States v. Miro, 60 F. 2d 58 (2d Cir. 1932) 40

United States v. O'Malley, 131 F. Supp. 409 (E. D. Pa. 1955) 16fn

PAGE

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United States v. Romano, —— U. S. ——, 86 S. Ct. 279 (1965) 40fn

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United States v. Schenck, 126 F. 2d 702 (2d Cir. 1942), cert. den., 316 U. S. 705, 62 S. Ct. 1309 (1942) 35

United States v. Shotwell Manufacturing Co., 355 U. S. 233, 78 S. Ct. 245 (1957) 35, 57

United States v. Venuto, 182 F. 2d 519 (3rd Cir. 1950) 40

United States ex rel. DeVita v. McCorkle, 248 F. 2d 1 (3d Cir. 1957) 26

Washington Gas Light Co. v. Connolly, 214 F. 2d 254 (D. C. Cir. 1954) 26, 31

York, Denny, 24 T.C. 742 (1955) 39

United States Constitution Cited

Fifth Amendment 5

Sixth Amendment 3, 5

Statutes Cited

26 U.S.C.:

Secs. 5601(b) (1), (2) 41

Sec. 7201 ..... 1, 5

PAGE

28 U.S.C.:

Sec. 1254(1) 2

Rules Cited

Supreme Court Rules:

Rule 21(4) 2

Rule 23 2

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pp. 18, 23 ..... 35fn

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p. 10 39

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p. 350 ..... 51fn

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Sec. 2594(2) 52

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vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Dr. Angelo Procario, hereby petitions this Honorable Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit, affirming, February 23, 1966, petitioner's conviction under 26 U.S.C. §7201, and affirming the District Court's denial of motions for a judgment of acquittal and for a new trial or a hearing on the question of trial jurors' bias, prejudice and fear which was not disclosed on their voir dire. A petition for rehearing and hearing *en banc* was denied April 8, 1966.

Opinions Below

The opinion of the Court of Appeals, officially reported at 356 F. 2d 614, is also reproduced in Appendix A to this petition. The opinion of the District Court denying the post-trial motions for judgment of acquittal, a new trial, and a hearing on the jury issue, not officially reported, appears at pp. 86a-112a of petitioner's appendix printed for the use of the Court of Appeals, nine copies of which will be filed with this petition pursuant to Rules 21(4) and 23 of the Rules of this Court.* The opinions in related proceedings, *Application of Bruno,* M 11-188 (S.D.N.Y. 6/9, 23/64), Government's appeal withdrawn, Docket No. 29823 (2d Cir. 10/30/64), are also not reported. The appendix filed in *Bruno* was made a part of the record of this case on appeal in the Second Circuit by order of the Hon. Henry J. Friendly, C.J. (App. 22a), and will be forwarded to this Court with this petition. The opinions of the Hon. Sidney Sugarman, United States District Judge for the Southern District of New York in *Bruno* are reprinted in Appendix B to appellant's brief below at pp. 1b-4b, and the opinion of the Court of Appeals appears at App. 26a-28a.

Jurisdiction

The jurisdiction of this Court is invoked under Section 1254(1), Title 28, United States Code, to review on petition for certiorari the decision of the Court of Appeals entered February 23, 1966, timely petition for rehearing and hearing *en banc* denied April 8, 1966.

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* References in this petition to the printed appendix before the Court of Appeals will be designated "App. —a". An opinion of the Hon. Edward Weinfeld, United States District Judge for the Southern District of New York, on the pre-trial motions for a bill of particulars and discovery and inspection, which is not here in question, was reported at 34 F. R. D. 486 (S. D. N. Y. 1963).

Questions Presented

1. Is the Sixth Amendment guarantee of "the right to a speedy and public trial, by an impartial jury' satisfied when the jury is composed of members who failed to disclose on the *voir dire* examination, *inter alia,* (a) that they believed doctors, of which petitioner is one, as a class are guilty of tax evasion, and (b) expressed the fear that if they, as patients and taxpayers, returned a verdict unfavorable to the prosecution, they would be subject to investigation of their own tax returns?

2. Are such statements as in Question 1 made by jurors during their service at a Federal criminal trial absolutely privileged and thus no basis for a new trial or a hearing to establish whether a new trial should be held?

3. Is the basic assumption of the bank deposit method of reconstructing a defendant's income, that all deposits to accounts in the name of the defendant are his current taxable income unless they are demonstrated not to be, consistent with the constitutional guarantees of due process and trial by jury, and the requirement that the prosecution carry the burden of proof?

4. Does the rule announced in *Holland* v. *United States,* 348 U. S. 121, 75 S. Ct. 127 (1954), requiring the prosecution as part of its *prima facie* case to demonstrate that it has investigated leads consistent with the defendant's innocence, apply to a case based on the bank deposit method of circumstantially reconstructing a taxpayer's income?

5. Should judgment of acquittal enter in a circumstantial income tax evasion case where the Government has failed to investigate leads supplied at least six months prior to indictment when the investigation would have shown that there was no unreported income, hence no crime?

6. Has the prosecution proved a *prima facie* case of tax evasion by the bank deposit method (a) when its own evidence is at least as consistent with innocence as with guilt, and (b) it fails to show that any item of income was omitted from the defendant's return, and (c) the evidence adduced on the issue of "wilfulness" is that according to the hypothetical reconstruction of alleged professional income by the bank deposit method there was unreported professional income for each of three successive years?

7. When a defendant has submitted a complete fiscal defense, independent of his own testimony or records, which is not rebutted by the prosecution, should a criminal tax evasion case be allowed to go to the jury?

8. In a circumstantial tax evasion prosecution, is it proper to submit the case to the jury when the prosecutor admits in open court that the Government's computation of the alleged unreported income is erroneous because it failed to include offsetting expenses, which were admittedly paid in amounts the Government was not able to determine, and the only evidence before the court and jury is that the amount of such offsets are in at least the amounts of income charged as unreported?

9. May a Federal prosecutor coerce defense witnesses with subpoenas in the name of the grand jury, held to be spurious and an abuse of process, and release to the press statements which falsely characterized such named witnesses as being involved in an investigation of a conspiracy to obstruct justice and "fee-splitting", and on trial of the defendant, whose witnesses they were, deny the defendant the opportunity to show such tactics as an attempted spoiliation of evidence?

Constitutional Provisions Involved

United States Constitution, Fifth Amendment

> "No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . ."

United States Constitution, Sixth Amendment:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . ."

Statutes Involved

Title 26, United States Code, §7201

> "Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title . . . shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution."

Statement of the Case

Petitioner, Dr. Angelo Procario, a medical doctor specializing in surgery (App. 142a), after a jury trial, on April 27, 1965, was convicted of wilfully attempting to evade his Federal income taxes for the years 1956, 1957, and 1958 in violation of 26 U.S.C. §7201 (App. 7a-9a; 113a). He was sentenced by the Hon. Edmund L. Palmieri to concurrent terms of a year and a day and cumulative fines of $3,000.00 on each count plus the costs of prosecution (App. 113a). Judge Palmieri stated at the time of sentence that no correc-

tive coercion was needed to reform petitioner's conduct, but that the sentence was imposed for the deterrent value it might have on others (R. 3232).*

The unreported income alleged in the indictment was based upon the "bank deposit method" of computation (App. 13a; 34 F.R.D. at 487, 488. The sole source claimed by the prosecution for the unexplained bank deposits which it attributed to unreported income was professional receipts from petitioner's medical practice (*Ibid.*).

The failure of the courts below to direct a new trial or hold a hearing on the evidence of trial jurors' bias, prejudice and fear which was not disclosed on their *voir dire* examination.

During the *voir dire* examination of prospective jurors the trial court after announcing this case was a tax evasion prosecution, put the following propositions and questions to prospective jurors:

> "The Court: . . .
>
> Now the defendant, Angelo Procario, is a practicing physician. He is a surgeon. You will hear a good deal of evidence emanating from members of that profession. I don't know what the evidence is but I assume that will be the case from the little I have heard during my pretrial conferences with the attorneys.
>
> Now have any of you any prejudices for or against members of the medical profession or a surgeon?

---

* Record references designated "R. —" are to pages in the stenographic transcript prepared in the District Court which, although part of the record on appeal, were not reprinted in petitioner's appendix in the Court of Appeals.

[There was no response from any juror who served in this case indicating bias or prejudice against members of the medical profession or surgeons]

Have any of you heard anything about this case?

[There was no response from the jurors who served in this case]

Has anyone spoke[n] to you about the defendant in this case, Dr. Procario?

[No response from jurors who served]" (App. 142a-43a)

The trial court also posed the following statements and questions to prospective jurors:

"The Court: . . .

Has any juror any personal or other experience which might tend to affect his ability to be fair and impartial to the defendant in this case? [No response by jurors who served]. That is another way of saying do you know of any reason why you could not decide the facts of this case solely on the basis of the evidence without prejudice of any kind and subject to the law as I will charge you.

Do you have any prejudice for or against the Internal Revenue Service, members of the Internal Revenue Service?

[No response from the jurors who served]

Have you at the present time any proceedings of any kind either by way of pending lawsuits, investigations or anything of that kind connected with the Internal Revenue Service.

[No response by jurors who served]

Have you in the past had any contacts with the Internal Revenue Service affecting your own tax status which may have created any feeling of prejudice for or against the Service?

[No response from jurors who served]

I understand that there will probably be witnesses employed by the Internal Revenue Service who will testify in this case. In the light of that probability I am going to ask you whether you have any prejudice for or against any employee of the Internal Revenue Service who might testify in the case.

You must realize that all witnesses who appear before you place their credibility in issue, and it is up to you to decide the extent to which their testimony should be accepted by you and the weight you should attribute to it. All witnesses stand on exactly the same footing. If you have, however, any feeling of prejudice for or against an Internal Revenue Service agent or any agent or the United States government you should make that fact known to me.

[No response by jurors who served]" (App. 144a-45a)

Each day of the six week trial there were abundant references to petitioner's alleged omission of receipts from his medical profession, to the many doctors with whom he was associated in the diagnosis and treatment of common patients. The sole witnesses for the defense outside of an accounting expert were 17 doctors who testified that they had received from petitioner fees for their services to him and to his surgical patients in the capacity of assistant surgeons and/or attending physicians (App. 1253a, 1268a, 1279a, 1358a, 1380a, 1421a, 1434a, 1467a, 1500a, 1519a, 1527a, 1548a, 1593a, 1634a, 1678a, 1704a, 1743a).

During the examination of petitioner's patients, called as witnesses by the prosecution, it appeared that the patients had deducted on their Federal income tax returns medical expense payments to petitioner in amounts which differed from those stated in their testimony at the trial (e.g., App. 796a-97a, 824a).

After the trial an alternate juror who had served from the first day of the trial until after the conclusion of the court's charge, contacted counsel for petitioner and, later, made himself available for interview by the Assistant United States Attorney in charge of the prosecution concerning statements and conduct of trial jurors which indicated that these jurors had failed to disclose on their *voir dire* bias and prejudice against doctors, particularly against doctors accused of tax derelictions, and that some jurors feared that if they should vote for acquittal their own tax returns would be subject to investigation (App. 78a-83a). According to the affidavit of the alternate juror which was submitted to the trial court in support of petitioner's post-verdict motion for a new trial, the following, *inter alia*, occurred amongst the jurors during the trial:

> "11. Just about in the middle of the trial while we were in the jury room, the view was expressed that, 'We had better be careful about what we do in this case because the Internal Revenue Service is liable to investigate all of us'. Several jurors nodded agreement.
>
> "12. The fear of becoming a subject of investigation came up again when the tax returns of some of the patients were referred to in court and those tax returns showed different amounts for medical expenses than the patients had said they paid. Several jurors felt as a result of this that the Government could very well investigate the tax returns of everyone who was in any way connected with the case.

"13. Several of the jurors felt that the defendant was guilty because doctors were always receiving fees in cash and putting the cash in their pockets. When a doctor makes a house call, they said, he frequently collects his fee in cash, pockets it, and that is the last that is heard about it.

"14. Juror No. 7, who is a bank teller, felt that doctors could easily cheat on cash fees. He said he knew that doctors had a lot of cash which could be unreported because doctors were always coming into his bank with large amounts of cash." (App. 80a)

During his interview by the prosecuting attorney, the alternate juror stated:

"I did not know whether I had done the right thing in contacting counsel for Dr. Procario, although I myself felt that it was my duty to do so, under the circumstances." (App. 83a)

Although "Mr. Leisure [the prosecuting attorney] told me [the alternate juror] that he thought I had done the right thing" (App. 83a), the prosecution opposed the hearing requested by petitioner on the issue of undisclosed bias, prejudice and fear of trial jurors (G. 119a-20a*). The trial court denied the motion for a new trial on this issue and also denied the requested hearing (App. 107a-112a). The trial court held that if the jurors' statements had been made during deliberations, they would have been privileged and therefore incompetent and inadmissible on a hearing:

"It should not be less so because the views were expressed outside the scope of the jury's deliberations." (App. 109a).

References marked "G. —a" are to the appendix of the Government printed for use in the Court of Appeals. The Government offered no proof on the jury issue.

The Court of Appeals agreed, stating:

> "The same policy considerations prevent inquiry here, or the alternate juror will become an unending source of uncertain verdicts." 356 F. 2d at 619.

The courts below failed to direct a judgment of acquittal although concededly the prosecution had failed to investigate leads establishing petitioner's innocence.

The Government failed to track down leads, investigation of which would have shown that there was no unreported income in any year.*

As early as October of 1959, during the special agents' investigation of petitioner, petitioner's previous representative informed one of the agents that any figure he derived for petitioner's gross professional income would have to be reduced by the payments petitioner made to other doctors who assisted him in surgery or supervised

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* Investigation would have shown that petitioner made payments of patients' fees to doctors who performed services for his surgical patients as assisting surgeons and/or attending physicians in these amounts:

1956	*1957*	*1958*
$12,102.00	$16,375.00	$15,269.00

(256 F. 2d at 616, Chart, line 11)

As petitioner reported on his tax returns only his share of the patients' fees, the assisting fees paid over by him had to be subtracted from the gross patients' fees alleged to have been unreported, which were in these amounts, according to the Government's proof:

1956	*1957*	*1958*
$11,071.66	$16,280.66	$15,059.23

(Ex. 502; App. 2121a)

the medical treatment of patients whom petitioner and the other doctors treated in common (App. 224a-25a). This statement was confirmed by hospital records which showed the assistance of the other doctors (Exs. 8, 18) and checks endorsed by petitioner to the assisting doctors.* This lead and the evidence supporting it were ignored by the agents.**

In December of 1962, six months prior to the return of the indictment against petitioner in May of 1963 (App. 1a), counsel for petitioner in a letter to the Department of Justice stated that the bank deposit method of reconstructing petitioner's professional income was inaccurate because of the special agents' failure to consider, among other things, the assisting fees which petitioner had paid to other doctors, but which were not deducted on petitioner's tax returns because he followed the practice of

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* Exs. 161, 162, 168, 170, 172, 173, 178, 180, 181, 185, 189, 2021-E, 2026, 2040-A, 2041-B, 2051, 2086, 2103, 2115, 2165, 2169-B, 2188, 2198, 2205, 2209, 2213, 2214, 2220, 2230, 2238, 2276, 2280.

** The failure of the special agent to understand his duty to investigate under *Holland* was clearly revealed on cross-examination:

> "Q. [by Mr. Bender] And yet you didn't at the same time think that you ought to write or contact any of these assisting surgeons?
>
> A. [by Special Agent English] I was trying to determine the doctor's income, Dr. Procario, not the income of any assisting doctors on the case.
>
> Q. Of course, and you just a moment ago testified that in determining the correct income of the doctor you would offset gross fees by 'referral' fees paid out so that was important in determining the income of the doctor, wasn't it?
>
> A. I didn't feel that it was my job to go out and seek fees paid to other doctors, no, sir." (App. 229a-30a)

reporting only the fees that were his and not those collected for and paid over to other doctors (Ex. P; App. 2078a, 2085a).* Enclosed with counsel's letter were the affidavits of assisting doctors stating that they had received fees from Dr. Procario in each of the years in question (App. 2090a-99a). Each of these affidavits was on the office stationery of the doctor concerned, which listed his name, address and telephone number (*Ibid.*). All of the doctors had their offices in New York City where the investigation which led to petitioner's indictment had been carried out. No attempt was made to investigate these leads prior to indictment or at any other time.

Petitioner moved for a judgment of acquittal on the failure to investigate these leads at the close of the Government's case (App. 1213a, 1225a-32a) when both sides had rested (App. 1877a), and after verdict (App. 31a-42a), but the motions were denied (App. 1248a-52a, 1904a, 112a).

The prosecution first conceded that the leads rule promulgated by this Court in *Holland* v. *United States*, 348 U. S. 121, 135-136, 75 S. Ct. 127, 135-36 (1954), applied alike to a bank deposit case and a net worth case "because they are both circumstantial evidence cases" (App. 1237a-38a), but later on the post-trial motions and on appeal contended that the leads rule did not apply to a bank deposit case. The trial court held that the *Holland* rule requiring the Government to investigate leads establishing the taxpayer's innocence did apply to a bank deposit prosecution because "the bank deposits method is equally fraught with the very dangers which led to the develop-

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* *At the trial it was conceded that this method of reporting petitioner's income was proper* (App. 93a-94a, 225a, 227a, 1027a; Ex. 502 (App. 2121a); 356 F. 2d at 616.

ment of the leads rule" (App. 92a-93a). The Court of Appeals thought it unnecessary to decide whether the leads rule applied to a bank deposit case because it agreed with the trial court that the leads supplied by petitioner were too vague and too late. 356 F. 2d at 617. In reaching this conclusion, the Court of Appeals made a restrictive interpretation of the leads rule established by *Holland* which applies alike to any circumstantial tax evasion case whether it involves the net worth method or the bank deposit method. The prosecution has never contended that it could not have investigated these leads prior to indictment on the basis of the information supplied to the Department of Justice by petitioner.* The trial court found as a fact that the prosecutor could have made such an investigation prior to indictment.**

The trial court and the Court of Appeals relied upon a single passage from the letter of petitioner's counsel to the Department of Justice, *supra*:

> "The proof is incomplete only in the sense that the affidavits do not reflect the specific sums received. Shortness of time prevented the accumu-

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* The prosecution could not have made such a contention because it was subsequently to demonstrate that it could contact all of these doctors within a few days. See discussion of *Application of Bruno*, M 11-188 (S. D. N. Y. 6/9, 23/64), Government's appeal withdrawn, Docket No. 29023 (2d Cir. 10/30/64), *infra*.

** "The Court: Mr. Leisure, you could have, if you wished, examined everyone of these doctors before the grand jury, before the indictment in this case was returned. You could have subpoenaed all their records and checks, everything that they had—and before this indictment was returned you could have had a full exposition of their position in this case." (App. 1890a); see also App. 1893a.

> lation of this additional evidence, which we hope to have shortly. These payments do not represent insubstantial amounts. Over this period in question, from information supplied to me, the payments amount to many thousands of dollars." 356 F. 2d at 617.

as exempting the prosecution from the leads rule because of "counsel's unfulfilled promise to provide more definite information." *Ibid.* This unfortunately overlooks the fact that counsel's letter of December 3, 1962 was, as well as a disclosure of the defense, a request of the Department of Justice for a conference to discuss the leads and other areas in the bank deposit computation (App. 2078a-82a, 2088a-89a). The letter of December 3, 1962 closed with the following passage:

> "Obviously, if these items of deposit which are non-taxable recipts have not been considered by the agent and eliminated from the totals of alleged unreported income, it is to your interest as well as to the taxpayer's to know that fact. The amounts are substantial enough to eliminate most, if not all, of the alleged unreported income for each of the three years.
>
> I shall await further word from you on this matter." (App. 2088a-89a).

Counsel's request was not honored and no further conference was held.

The requirement in the decision below of a further but unspecified quantity of detail in a lead is contrary to this Court's opinion in *Holland* and the decisions of other Cir-

cuits.* The rule in other decisions is that a lead is sufficient to require investigation if it presents enough information to allow investigation. The affidavits of the assisting doctors comply with that rule.

The vague and unreliable method of reconstructing income was a violation of due process.

A. The bank deposit method.

The bank deposit reconstruction of petitioner's income below rested on this basic assumption: All check deposits to petitioner's bank and brokerage accounts were deemed to be current professional income unless they were demonstrated to have another source. According to the tabulation appearing in the opinion of the Court of Appeals, the use of the bank deposit method below showed the following results:

	1956	*1957*	*1958*
"1) Total deposits	$197,290.93	$140,421.37	$160,058.47
2) Outside receipts	—173,903.77	—114,362.71	—137,158.80
3) 1 less 2 [*i.e.*, check deposits claimed to be professional income]	$ 23,387.16	$ 26,058.66	$ 22,899.67"

356 F. 2d at 616.

* *Fairchild* v. *United States*, 240 F. 2d 944, 948 (5th Cir. 1957); *United States* v. *Fenwick*, 177 F. 2d 488, 491, 494 (7th Cir. 1949); *United States* v. *O'Malley*, 131 F. Supp. 409, 412-3 (E. D. Pa. 1955); and in the Tax Court, *William J. Powers, Jr.*, 21 T. C. M. 17 (1962). See also, *United States* v. *Frank*, 245 F. 2d 284, 287 (3d Cir. 1957); *Bostwick* v. *United States*, 218 F. 2d 790, 793, 794 (5th Cir. 1955); and, *Semble*, *Merritt* v. *United States*, 327 F. 2d 820, 822, 823 n. 8 (5th Cir. 1964), adhered to 329 F. 2d 757, 334 F. 2d 759.

A similar computation in somewhat different form was presented to the trial court and the jury as Government's Exhibit 502 (App. 2121a). Thus, the implication of the Government's own bank deposit analysis, which shows that in excess of 80% of the deposits made to petitioner's accounts were not professional income, is directly contrary to the assumption that deposits equal professional receipts. Further, the Government made an alternative computation of what it claimed were petitioner's identified professional receipts without reliance on the bank deposit method, introduced as its Exhibit 506 (App. 2123a), which showed there was no unreported income.*

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* The following tabulation shows the results of this determination as adjusted for those offsets and deductions necessitated solely by the prosecution's evidence and concessions:

	1956	*1957*	*1958*
"Identified Unreported Professional Receipts" (Ex. 506; App. 2123a)	000	$5,823.78	$3,363.08
Less:			
Net corrections to conform Exhibit 506 to evidence of cash and check receipts (Exs. AAS, AAV; App. 1788a-94a, 1801a, 1803a)		(480.00)	(794.00)
Overstatement of capital gains, deductions not taken for interest, real estate taxes and depreciation per stipulation (App. 1798a-99a, 1813a)		(2,754.00)	(2,410.00)
Assisting fees allowed by Government from Lo Casto testimony (Ex. 502; App. 2121a)		(1,195.00)	(1,200.00)
Additional assisting fees through third party checks (Government exhibits, see App. 69a)		(787.50)	(882.50)
	—	$ 607.28	$ —

The Court of Appeals held that it was sufficient for the Government to have shown that some professional income was deposited and that the unidentified deposits attributed by the Government to professional income were similar in amount to professional fees inasmuch as petitioner allegedly had more patients than the prosecution had evidence of payments. 356 F. 2d at 618. There was, however, no proof that these additional patients had made any payments. There was further no proof that even a single professional fee had gone unreported.

On the issue of wilfulness, it was held by the Court of Appeals that the Government bore its burden if all that it showed was that by the bank deposit method just described it could show a computation of unreported income for each of three successive years. 356 F. 2d at 618.

B. The admission by the prosecution that its reconstruction of income was uncertain.

In its computation of petitioner's professional income, the prosecution allowed as offsets against unreported income assisting fees in amounts which varied between 5% and 7% of the amounts established by the assisting doctors.* These small amounts were claimed by the prosecution to represent payments of assisting fees by petitioner's personal checks (App. 243a-45a, 281a), while the much greater amounts established by the assisting doctors were paid by cash,** by petitioner's personal checks and by third par-

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* Compare Government's Ex. 502, App. 2121a, at line which bears legend, "less deducted by Benedetto Lo Casto", with Ex. AAP, App. 2119a.

** It was also the Government's standard practice in this case to treat an amount which could not be determined to be cash or check as cash to avoid duplicating a check item (App. 1148a).

ty checks endorsed to them by petitioner (App. 1260a-61a, 1281a, 1320a, 1371a, 1383a, 1407a, 1447a, 1468a, 1511a-12a, 1531a, 1577a-80a, 1582a, 1601a, 1651a-52a, 1684a, 1735a). In his summation the prosecutor admitted that there were more assisting fees paid than the amounts which were credited to petitioner in the Government computations:

> *"There is no question he paid some cash to those other doctors"* (App. 1976a; emphasis added).

The prosecutor further exposed the unreliability of the Government's computation by admitting to the jury:

> *"The government is not able to determine how much in cash he paid to those other doctors."* (App. 1976a; emphasis added).

Affirming the trial court's denial of a judgment of acquittal on these admissions, the Court of Appeals held that:

> "even if the prosecutor's statement did cast some doubt on the Government's case, the doubt could be found to concern merely the precise amount, not the existence of a substantial understatement." 356 F. 2d at 618.

This holding, erroneous because the only basis in the record for determining any other amount of assisting fees would be the complete offset of unreported income established by the assisting doctors, is in conflict with the decisions of other Circuits, which hold that when the prosecutor or a Government agent admits that he has omitted items from the circumstantial reconstruction of a taxpayer's income which would reduce the allegedly unreported income by an undetermined amount, the method of reconstruction is thus rendered too unreliable for its submission to the jury.*

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* *Bryan* v. *United States*, 175 F. 2d 223, 227 (5th Cir. 1949); *Merritt* v. *United States*, 327 F. 2d 820, 822, 823 (5th Cir. 1964); *United States* v. *Fenwick*, 177 F. 2d 488, 492 (7th Cir. 1949).

The complete fiscal defense was not rebutted.

Since the prosecution had failed to investigate the leads showing that petitioner had paid assisting fees to other doctors during the years in question, petitioner was forced to come forward at the trial to prove the accuracy of these leads. Through the testimony of 17 doctors,* doctors' books and records where available.** hospital records in evidence and available checks*** endorsed by petitioner to assisting doctors, petitioner showed that he had paid to these doctors fees for their services to his patients as assisting surgeons or attending physicians amounts which offset completely the claimed unreported professional income (Ex. AAP; App. 2119a). *This evidence was not rebutted in any manner.*

Error in excluding the prosecution's attempted spoiliation of evidence.

The year following petitioner's indictment, the Assistant United States Attorney in charge of prosecuting the case against petitioner caused to be served on the assisting doctors whose affidavits had been submitted to the Department of Justice subpoenas in the name of the grand jury calling upon each doctor to appear in the Assistant's

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* App. 1253a-1704a.

** Exs. X, Y, Z, AB, AC, AD, AE, AF, AG, AH, AI, AJ, AL, AM AN, AO, AP, AS).

*** Exs. 161, 162, 168, 170, 172, 173, 178, 180, 181, 185, 189, 2021-E, 2026, 2040-A, 2041-B, 2051, 2086, 2103, 2115, 2165, 2169-B, 2188, 2198, 2205, 2209, 2213, 2214, 2220, 2230, 2238, 2276, 2280.

office (Br. App. 20a-28a, 73a-82a).* Each subpoena stated its purpose was to secure the subpoenaed doctor's testimony "in regard to an alleged violation of Section 1503, Title 18, United States Code" (the obstruction of justice statute).**

Petitioner and the assisting doctors moved to quash the alleged grand jury subpoenas on the grounds that they were an abuse of process in that (a) there was no such alleged grand jury investigation, and (b) after failing to investigate the leads concernng assisting fees prior to indictment, the prosecution was now attempting to coerce statements from the assisting doctors solely for impeachment use (Br. App. 8a, 14a, 48a). While the proceeding to quash the grand jury subpoenas was pending before the District Court, the prosecutor caused, through a press release, the following items to appear in the New York Times of February 20, 1964:

> "U. S. Presses Inquiry On Bronx Doctors
>
> The Federal Government sought yesterday to force five Bronx physicians to appear before a grand jury investigating a possible conspiracy to obstruct justice.

* References designated "Br. App. —" refer to the appendix printed for the Court of Appeals in *Application of Bruno*, Docket No. 29023 (2d Cir. 10/30/64), which was made a part of the record on appeal in this case (App. 22a), and which the Clerk of the United States Court of Appeals for the Second Circuit accordingly will be asked to forward to this Court. Such references with the suffix "a" are to appellant's appendix, while those with the suffix "b" are to appellee's appendix.

** It should be noted that using the affidavits previously submitted to the Department of Justice, the prosecution was able to contact all the assisting doctors within a period of a few days. See Br. App. 34a-38a.

> The physicians had asked that earlier grand jury subpoenas be suppressed by Federal Court. The matter will be argued at a later date.
>
> The investigation grew out of charges of income tax evasion against Dr. Angelo Procario, a surgeon, of 2396 Tiebout Avenue. The Government is now investigating possible fee-splitting.
>
> The physicians, according to Assistant United States Attorney Peter Leisure, told the Justice Department that they had referred surgery patients to Dr. Procario, who is president of the University Heights Sanitarium, 74 Tremont Avenue. The surgeon submitted a single bill to the patient, which included the services of the referring physician.
>
> The five physicians are Dr. Louis A. Bruno, 1051 Hollywood Avenue; Dr. John E. DeFrancisco, 2338 University Avenue; Dr. Nicholas De Simone, 2417 Southern Boulevard; Dr. William N. Fosco, 2501 Laconia Avenue, and Dr. Edward A. Pfeiffer, 2557 University Avenue." (Br. App. 5b).

The prosecution contended that there was a *bona fide* grand jury investigation which involved, *inter alia*, certain alleged missing hospital records reflecting surgeries (Br. App. 17a). On June 9 and June 23, 1964, the Hon. Sidney Sugarman, United States District Judge for the Southern District of New York, quashed the subpoenas as abusive, holding that:

> "the employment of grand jury subpoenas under the guise of investigation of another crime of obstructing justice but merely to force disclosure of what the witnesses would testify at defendant's trial, was an abuse of this court's process" (Br. App. 53a, 1b).

and

> "The orders are based upon my conviction that the dominant, if not sole, purpose in issuing the quashed subpoenas was not to investigate the different crime of obstructing justice but rather to compel defendant's witnesses to unwillingly confer with the United States Attorney in his preparation for the trial of the tax evasion case by prying into those witnesses' probable testimony." (Br. App. 88a-89a, 3b).

The Government's appeal from Judge Sugarman's decision was withdrawn on the grounds that the allegedly missing hospital records had been discovered in the possession of an Internal Revenue agent (App. 25a). Over petitioner's objections, the Second Circuit on the eve of decision granted the Government's motion to withdraw, but observed that Judge Sugarman's finding was based "on persuasive evidence" (App. 27a).

At petitioner's trial the Court refused to allow petitioner to bring before the jury the tactics employed by the prosecution in *Application of Bruno* as evidence of an attempt to intimidate witnesses which could and should be construed as a confession of weakness of the prosecution's case (App. 1201a). On the other hand, the prosecution's witnesses were allowed to advert to *Application of Bruno* without specifying the circumstances as indicative of a refusal of the assisting doctors to confer with Government agents, *i.e.*, a fallacious imputation of evasiveness (see, *e.g.* App. 1199a).

The Court of Appeals below held it was incumbent upon petitioner to show actual intimidation of his witnesses, 356 F. 2d at 618, even though the trial court had refused to allow petitioner's witnesses to even mention the circum-

stances (see App. 1201a-02a, 1276a). The Court of Appeals also suggested that the abuse of grand jury process practiced on petitioner and his witnesses and the intimidation by the press release was "a matter for disciplinary action by the Court." 356 F. 2d at 618. This holding conflicts with the decision of the Court of Appeals for the District of Columbia in *Durbin* v. *United States*, 221 F. 2d 520, 522 (D. C. Cir. 1954) and with the decision in other circuits which hold that analogous evidence is admissible when proffered by the prosecution.

Reasons for Granting the Writ

1. A conviction after a trial where the jury was not impartial may not stand under the Sixth Amendment.

Petitioner made an uncontradicted showing that the verdict below had been returned by jurors with bias and prejudice against him who feared that an acquittal would bring reprisals from the prosecuting agency. The United States Court of Appeals for the Second Circuit held that this showing would not be received because the general policy favoring certainty of verdicts forbids evidence of the jurors' statements and conduct. 356 F. 2d at 619.

Petitioner submits that this holding infringes the Sixth Amendment guarantee of trial by an impartial jury. The holding below also represents a fusion of the rule against receiving evidence of the operations of jurors' minds during final deliberation and of the method by which the verdict was reached with the rule allowing evidence of jury fear, favor or prejudice through jurors' statements and and conduct, rules which have been kept separate by other Circuits in the cases hereinafter cited, for competing policy reasons. Indeed, this Court has previously held in *Aldridge*

v. *United States*, 283 U. S. 308, 314-315, 51 S. Ct. 470, 473 (1931), that the administration of criminal justice in the Federal Courts is ill served by a rule which forecloses inquiry of jury prejudice:

> "We think that it would be far more injurious to permit it to be thought that persons entertaining a disqualifying prejudice were allowed to serve as jurors and that inquiries designed to elicit the fact of disqualification were barred. No surer way could be devised to bring the processes of justice into disrepute." 283 U. S. at 315, 51 S. Ct. at 473.

The Sixth Amendment's guarantee to all accused citizens of a "speedy and public trial by an impartial jury" is effectuated by a number of procedural safeguards. No communication or transaction affecting jurors by any party, *Lewis* v. *United States*, 146 U. S. 370, 13 S. Ct. 136 (1892); by any prosecutorial agent, *Remmer* v. *United States*, 347 U. S. 227, 74 S. Ct. 450 (1954); by the court, *Remmer* v. *United States*, 347 U. S. at 229-230, 74 S. Ct. at 451; or even by an outsider, *Mattox* v. *United States*, 146 U. S. 140, 150, 13 S. Ct. 50, 53 (1892), not in the presence of the accused and counsel is permitted. Prospective jurors should not be exposed to other proceedings indicating the guilt of the accused. *Leonard* v. *United States*, 378 U. S. 544, 84 S. Ct. 1696 (1964). A *voir dire* examination of prospective jurors must be held to determine their freedom from bias, prejudice and fear and to allow the appropriate exercise of challenges, peremptory and for cause. *Swain* v. *State of Alabama*, 380 U. S. 202, 218-21, 85 S. Ct. 824, 835-36 (1965); *Aldridge* v. *United States*, *supra*. The failure of the trial court to question prospective jurors on views or circumstances which might disclose a lack of impartiality requires reversal of the subsequent conviction by jurors

whose impartiality was not made certain. *Morford* v. *United States,* 339 U. S. 258, 259, 70 S. Ct. 586, 587 (1950). As this Court held in *Morford*:

> " 'Preservation of the opportunity to prove actual bias is a guarantee of a defendant's right to an impartial jury.' " 339 U. S. at 259, 70 S. Ct. at 587, quoting *Dennis* v. *United States,* 339 U. S. 171-172, 70 S. Ct. 523.

Bias and prejudice may be shown when the opportunity first arises, either on *voir dire* as in *Irvin* v. *Dowd,* 366 U. S. 717, 81 S. Ct. 1639 (1961), or during or after trial as in *Remmer* v. *United States,* 350 U. S. 377, 76 S. Ct. 425 (1956); *Marshall* v. *United States,* 360 U. S. 310, 79 S. Ct. 1171 (1959); *Clark* v. *United States,* 289 U. S. 1, 53 S. Ct. 465 (1933); *Mattox* v. *United States, supra; Washington Gas Light Co.* v. *Connolly,* 214 F. 2d 254, 257 (D. C. Cir. 1954); *Consolidated Gas & Equipment Co. of America* v. *Carver,* 257 F. 2d 111, 114-16 (10th Cir. 1958); *Rubenstein* v. *United States,* 227 F. 2d 638, 642-43 (10th Cir. 1955); *Photostat Corporation* v. *Ball,* 338 F. 2d 783, 786-87 (10th Cir. 1964); *United States* v. *Alker,* 180 F. Supp. 661, 662-64 (E. D. Pa. 1959); or on application for collateral relief as in *United States ex rel. DeVita* v. *McCorkle,* 248 F. 2d 1 (3d Cir. 1957).

In the present case, precautions were taken on *voir dire* examination of prospective jurors to ensure their impartiality. The trial court was careful to inquire of prospective jurors about their prejudices against the medical profession, of which petitioner is a member, their knowledge of this case (App. 142a-43a), experiences which might tend to affect their ability to be fair and impartial to the defendant, and involvement with or prejudice for or against the Internal Revenue Service (App. 144a-45a), the criminal

arm of which prepared the case against petitioner. No response from a juror who served indicated that because of his own tax affairs he would hesitate to vote for a result unfavorable to the Internal Revenue Service or that through his own inclination and observations he was of the opinion that doctors practiced income tax evasion, with which petitioner was charged.

As petitioner's counsel and the prosecutor first learned after trial (App. 78a, 83a), jurors during the trial expressed the fear that the action they took in this case might precipitate an investigation of their own tax returns (App. 80a), and also stated that the defendant was guilty because doctors always received unreported cash fees which they brought into banks (Ibid.)* These and other facts concerning the jury's conduct were brought to the attention of the trial court on the post-verdict motion for a new trial,** in the form of an affidavit of an alternate juror who had served throughout the trial (App. 78a) and who stated that he would be available to testify at a hearing (App. 84a).

On denying the motion for a new trial and declining to hold a hearing on jury partiality, the trial court held that (1) evidence of the statements and conduct of jurors disclosed in the affidavit would be inadmissible and incompetent if they occurred during final deliberations (App. 109a),

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* The prosecution's case of income tax evasion against Doctor Procario was based on the bank deposit method of reconstructing his income. See Point 2, *infra*.

** A hearing on the issue of juror partiality was also requested (App. 76a).

The additional areas of jury conduct mentioned in the alternate juror's affidavit (App. 78a-79a, 81a-82a) were offered mainly as evidence of partiality in action.

and (2) that "rule" should be extended to jurors' statements and conduct before and after deliberations in order to protect a jurors' "subjective freedom of expression" (App. 109a-11a). The Court of Appeals agreed adding the further ground that any other rule would provide "an unending source of uncertain verdicts", 356 F. 2d at 619.

In support of its ruling, the Court of Appeals cited its earlier decision of *United States* v. *Crosby*, 294 F. 2d 928, 950 (2d Cir. 1961), and *McDonald* v. *Pless*, 238 U. S. 264, 267, 35 S. Ct. 783, 59 L. Ed. 1300 (1915). The *Crosby* decision is not here pertinent.* In *McDonald* v. *Pless*, *supra*, this Court refused to hold that jurors in that *civil* case should have been allowed to testify that they had reached a quotient verdict by adding together the amounts each juror thought the plaintiffs should recover and dividing the result by 12, 238 U. S. at 265, 35 S. Ct. at 783, for "there is nothing in the nature of the present case warranting a departure from what is unquestionably the general rule, that the losing party cannot, in order to secure a new trial, use the testimony of jurors to impeach their verdict." 238 U. S. at 269, 35 S. Ct. at 785.** To McDonald's arguments that such a general rule would have an adverse impact on the administration of criminal justice and would allow trial jurors untrammelled scope for wrongdoing, this Court replied:

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* In *Crosby*, the Second Circuit refused to order a new trial on a showing that one of the jurors during his final deliberations had interpreted a co-defendant's plea of guilty during the trial as implicating the nine remaining defendants because it would involve a forbidden inquiry into the mental processes of jurors during final consideration of their verdict. 294 F. 2d 949-50. Petitioner has no quarrel with that general rule and desires no such inquiry.

** Even as to that, this Court recognized "that it would not be safe to lay down any inflexible rule", 238 U. S. at 268, 35 S. Ct. at 785.

> "The suggestion that, if this be the true rule, then jurors could not be witnesses in criminal cases or in contempt proceedings brought to punish the wrongdoers, is without foundation." Ibid.

Does the general rule stated in *McDonald*, where properly qualified jurors were not allowed to state the manner in which they reached their verdict in a civil action for modest damages, extend to a case where the statements and conduct of jurors trying grave crimes against the revenue, demonstrate that they had not disclosed on their *voir dire* that as they felt all who practiced petitioner's calling were guilty of the crime with which he was charged he must be also, and that they feared reprisal from the Government agency prosecuting the case if they did not find in its favor?*

This Court, petitioner respectfully submits, indicated a negative answer in *Clark* v. *United States*, 289 U. S. 1, 53 S. Ct. 465 (1933).** Mrs. Clark argued before this Court that under the general rule stated in *McDonald* her statements to fellow jurors while she was serving on the petit jury at a previous criminal trial were privileged and should not have been received by the trial court as evidence of her misconduct, 289 U. S. at 12-13, 53 S. Ct. at 468-69. This

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* Each Court below noted that the alternate juror's affidavit did not, at least directly, refer to conduct during final deliberations. 356 F. 2d at 619; App. 109a. The trial court, however, was of the opinion that its instructions to the jury had little effect on removing the jurors' impression of the case. "No matter how much [jurors] may be affected by the Court's charge and by the deliberations on the verdict, those impressions cannot be obliterated" (App. 110a).

** Clark was cited in petitioner's brief on appeal below at pp. 47, 49-50.

Court, speaking through Mr. Justice Cardozo, unanimously held:

> "Nor is there anything in our decision at variance with the rule, which is not without exceptions (Mattox v. United States, 146 U. S. 140, 148, 13 S. Ct. 50, 36 L. Ed. 917; cf. Wigmore, Evidence, vol. 5, §§ 2353, 2354; Woodward v. Leavitt, 107 Mass. 453, 9 Am. Rep. 49; Hyman v. Eames [C. C.] 41 F. 676; Fuller v. Fletcher [C. C.] 44 F. 34, 39), that the testimony of a juror is not admissible for the impeachment of his verdict. McDonald v. Pless, 238 U. S. 264, 35 S. Ct. 783, 59 L. Ed. 1300. Here there was no verdict, and hence none to be impeached. But in truth the rule against impeachment is wholly unrelated to the problem now before us, the limits of the privilege to maintain a confidence inviolate. Wigmore, supra, § 2346. Impeachment may be forbidden though the jurors waive their privilege, and combine with the defeated litigant to make the verdict null. Privilege may be asserted though there is nothing to impeach." 289 U. S. at 18, 53 S. Ct. at 470-71.

Petitioner's preliminary showing of jurors' statements and conduct during the trial was directed not to the method by which they reached their verdict* but as indicia of bias, prejudice and fear which had not been disclosed by those jurors on their *voir dire* examination and which evidenced a lack of impartiality which would have disqualified them from service.** As we read the *Clark* decision, the juror's

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* Indeed, the affidavit of the alternate juror necessarily made no reference to the actual deliberations (App. 78a).

** At the very least, disclosure of this information on *voir dire* would have permitted exercise of a peremptory challenge.

statements and conduct were admissible for that purpose and pertinent to that issue:

> "She has not been held to answer for any verdict that she has rendered, nor for anything said or done in considering her verdict. Matter of Cochran, supra. She has been held to answer for the deceit whereby she made herself a juror, and was thereby placed in a position to vote upon the case at all. What was said and done in the jury room is not the gist of her wrongdoing. What was said and done in the jury room is no more that confirmatory evidence of her state of mind before." 289 U. S. at 17-18, 53 S. Ct. at 470.

The Second Circuit has now held that the exclusionary rule previously applied by this Court to jurors' statements which go to their state of mind during deliberations and their method of arriving at a verdict also applies to statements and conduct evincing undisclosed bias and prejudice against a defendant in a criminal case* and fear of reprisal by the Government agencies who are his prosecutors. The Courts of other Circuits distinguish between those situations holding the former inadmissible and the latter not only admissible but requiring a new trial. *Washington Gas Light Co.* v. *Connolly, supra*; *Consolidated Gas & Equipment Co. of America* v. *Carver, supra*; *Rubenstein* v. *United*

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* *Hyde* v. *United States*, 225 U. S. 347, 32 S. Ct. 793 (1912), cited in *McDonald*, 238 U. S. at 269, 35 S. Ct. at 785, although a criminal case, involved the same point as *McDonald*, "horse-trading" by jurors during final deliberation. 32 S. Ct. at 808. There was no question of concealment by jurors of bias, prejudice or fear.

States, supra; *Photostat Corporation* v. *Ball, supra*; *United States* v. *Alker, supra*.*

A familiar rubric for impartiality is that no one shall be judged on account of his race, religion or calling. The showing foreclosed below demonstrated that jurors were biased against petitioner because of his calling. But in any case involving any basis or bias, the decision below forecloses inquiry. It is difficult to imagine a rule of greater general harm to the jury system in this country.

The Courts below expressed a desire to protect jurors' "subjective freedom of expression". Petitioner favors such freedom but would argue for a rule which encourages and requires the exercise of freedom of expression on *voir dire*.**

Nor should there be a distinction on the admissibility of a showing of bias or prejudice infecting the juror's serv-

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* Cited with approval by the Third Circuit in *United States* v. *Kum Seng Seo*, 300 F. 2d 623, 626 (3d Cir. 1962). As a practical matter it should make no difference whether the prejudicial prejudgment of a case came to the jury through the introduction of newspaper accounts as in *Kum Seng Seo* and *Marshall* v. *United States, supra*, or came initially with jurors who failed to disclose those views on *voir dire* as in the present case. See also, *Irvin* v. *Dowd, supra*, and *Clark* v. *United States, supra*.

** "Certainly the *voir dire* oath administered to potential jurors obligates them fully to tell the truth." *Brown* v. *United States*, 356 F. 2d 230, 232 (10th Cir. 1966); *Photostat Corp.* v. *Ball*, 338 F. 2d at 786. Were that not so there would be little utility in requiring a thorough *voir dire* examination. *Morford* v. *United States, supra*; *Swain* v. *State of Alabama, supra*.

ice* as to whether the proponent is a defendant wrongfully convicted by a partial jury or by the prosecuting agency which believes a defendant was wrongfully acquitted. Such a result would put prospective jurors on notice that their misconduct can only be questioned if they acquit, exactly the fear expressed below (App. 80a). See *Morford* v. *United States, supra.* It is not without significance that the prosecutor in the present case, while informing the alternate juror that he had done the right thing in coming forward (App. 83a), nonetheless, successfully opposed a hearing on the ground that the jurors' statements were inadmissible.

The Court of Appeals denied petitioner not only a new trial but even a hearing on his preliminary showing that he was a member of a class, all members of which some trial jurors were of the opinion committed the offense with which petitioner was charged. Compare *Aldridge* v. *United States, supra,* and *United States* v. *Campbell,* 316 F. 2d 7, 8-9 (4th Cir. 1963).

The Court of Appeals reached this result not on the ground that petitioner's showing was insufficient, but because the public policy in favor of the finality of verdicts

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* "Assuming that there is a privilege which protects from impertinent exposure the arguments and ballots of a juror while considering his verdict, we think the privilege does not apply where the relation giving birth to it has been fraudulently begun or fraudulently continued. Other exceptions may have to be made in other situations not brought before us now. It is sufficient to mark the one that is decisive of the case at hand. The privilege takes as its postulate a genuine relation, honestly created and honestly maintained. If that condition is not satisfied, if the relation is merely a sham and a pretense, the juror may not invoke a relation dishonestly assumed as a cover and cloak for the concealment of the truth." *Clark* v. *U. S.,* 289 U. S., *supra,* at 13-14, 53 S. Ct., *supra,* at 469.

was thought to require it, 356 F. 2d at 619. In this holding, we argue, there was a drastic departure from the policy stated by this Court in *Aldridge* v. *United States, supra.*

The philosophy adopted below by the Second Circuit would allow these verdicts, among others, by jurors who did not disclose in response to pertinent *voir dire* questions that they had "knowledge" of the following "facts": conviction of a negro for rape or any crime of violence because that is how negroes behave; conviction of a buddhist for possession of narcotics because they use them in their temples; conviction of a "WASP" for violation of the civil rights act because they always deny the rights of other minority groups; conviction of the practitioner of a respectable profession for tax evasion because members of that profession always cheat on cash fees (expense accounts, charitable deductions, etc.). Convictions by jurors bringing such undisclosed knowledge to the jury room would be upheld even though there was a witness competent, but for the Second Circuit rule, to establish them.

No policy favoring certainty should extend to verdicts by partial jurors. No deterrence of conduct thought harmful is provided by sustaining guilty verdicts of biased jurors. No enhancement of the administration of criminal justice in Federal Courts is provided by the blind upholding of verdicts rendered by the unqualified.

2. The use of the "bank deposit method" below violated fundamental fairness and the constitutional guarantees of due process, of trial, and against self-incrimination.

The holding below that the bank deposit method of reconstructing petitioner's professional income was properly employed in this case constitutes an infringement of petitioner's rights to due process and to be free from self-incrimination under the Fifth Amendment and his right to

trial under the Sixth Amendment, is a departure from the standards set by this Court for the conduct of criminal tax evasion cases, and conflicts with decisions in other Circuits and in the Tax Court.

A. The bank deposit method of proving tax evasion.

In the vastly expanded field of Internal Revenue investigations*, agents and special agents of the Internal Revenue Service seek to establish that taxpayers have failed to report all their taxable income by two quite different methods:

1. The specific items method of proof.

The prosecution attempts to establish by direct proof that specific receipts of income were omitted from the taxpayer's returns, e.g. *Sansone* v. *United States*, 380 U. S. 343, 344, 85 S. Ct. 1004, 1006 (1965); *United States* v. *Shotwell Manufacturing Co.*, 355 U. S. 233, 237-38, 78 S. Ct. 245, 249 (1957), or that a specific deduction claimed on the taxpayer's return was overstated or not allowable, e.g., *United States* v. *Ragen*, 314 U. S. 513, 517, 522-23, 62 S. Ct. 374, 375, 378 (1942); *United States* v. *Schenck*, 126 F. 2d 702, 704 (2d Cir. 1942), cert. den. 316 U. S. 705, 62 S. Ct. 1309 (1942). The proof offered is a direct measure of the income or deductions derived from a given economic activity.**

2. Circumstantial theories—the bank deposit and net worth methods of proof.

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* In the fiscal year ended June 30, 1963, according to the Annual Report of the Commissioner of Internal Revenue, pp. 18, 23, 3,800,000 returns were audited, 807,000 field audits were made and 10,873 "tax fraud" investigations were conducted.

** The computation of petitioner's professional income by the specific items method on the proof presented by the Government below demonstrated that there was *no* unreported professional income. See footnote at p. 17, *supra*.

In an increasing number of cases, the prosecution does not rely upon a direct measure of the economic activity, the income from which it seeks to establish, but, instead, attempts to reconstruct the taxpayer's income by showing the extent of its use either in the acquisition of assets—the net worth method, or in the accumulation of credits in accounts at banks and brokerage houses—the bank deposit method.* In *Holland* v. *United States*, 348 U. S. 121, 75 S. Ct. 127 (1954) and the companion cases of *Friedberg* v. *United States*, 348 U. S. 142, 75 S. Ct. 138 (1954), *United States* v. *Calderon*, 348 U. S. 160, 75 S. Ct. 186 (1954), and *Smith* v. *United States*, 348 U. S. 147, 75 S. Ct. 194 (1954), this Court held that net worth computations were a permissible method of proving the amount of income in a tax evasion prosecution provided that certain safeguards were imposed under the close scrutiny of the appellate courts. 348 U. S. at 126-29, 75 S. Ct. at 131-32. This Court has not yet passed upon the acceptability of the bank deposit method of circumstantial proof, nor has this Court had occasion to state what safeguards are necessary in the use of that method, should it prove constitutionally and procedurally acceptable.

Petitioner contends that in a criminal prosecution for tax evasion the bank deposit method of circumstantially reconstructing a taxpayer's income is violative of the Fifth Amendment's guarantees of due process and the privilege of a taxpayer not to incriminate himself, the Sixth Amendment's guarantee of the right to trial and is so procedurally

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* In conjunction with the net worth and bank deposit methods, the prosecution sometimes attempts to show additional income through proof of non-deductible expenditures which did not result in the acquisition of assets or credits to accounts. The present case involves only the use of the bank deposit method. No proof of expenditures was offered.

unfair as to call for its exclusion under this Court's power to formulate rules of evidence and procedure necessary to maintain "proper standards for the enforcement of the federal criminal law in the federal courts", *McNabb* v. *United States,* 318 U. S. 332, 341, 63 S. Ct. 608, 613 (1943); *Holland* v. *United States,* 348 U. S. at 135 n. 7, 75 S. Ct. at 135 n. 7.

Should this Court hold that the bank deposit method of proof is not entirely foreclosed, petitioner urges that this Court establish safeguards for its utilization at least as extensive as those promulgated in *Holland* for the parallel net worth method, since as the trial court found below after presiding over this bank deposit prosecution:

> "As noted, the *Holland* case, which is the leading case in the area, involved the net worth method of prosecution. This case involves the bank deposits method. The distinction, however, does not make a difference. Both methods of proof are equally dependent on circumstantial evidence. The bank deposits method is equally fraught with the very dangers which led to the development of the leads rule. *Cf. United States* v. *Frank, supra.*" (App. 92a-3a).

The original and still the basic assumption on which a bank deposit computation rests is broad and deceptively simple. All deposits, the source of which is unknown*, to

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* Such deposits are often referred to as unidentified deposits. This Court noted in *Holland* that there was a similar problem with the basic assumption of the net worth method:

> "One basic assumption in establishing guilt by this method is that most assets derive from a taxable source, and that when this is not true the taxpayer is in a position to explain the discrepancy. The application of such an assumption raises serious legal problems in the administration of the criminal law. Unlike civil actions for the recovery of deficiencies, where the determinations of the Commissioner have *prima facie* validity, the prosecution must always prove the criminal charge beyond a reasonable doubt." 348 U. S. at 126, 75 S. Ct. at 130.

bank, brokerage or other accounts maintained in the name of the taxpayer, either alone or together with others, are deemed to be current receipts of taxable income unless it be demonstrated that they are not. Not only is that assumption not a necessary one, the contrary alternatives are almost inexhaustible. Deposits are made, for example, of previous accumulations of currency[2], of gifts[3], of inheritances[4], of loans[5], of repayments of loans[6], of withdrawals redeposited[7], of return items debited to the account and put through for collection on successive occasions[8], of funds collected or held for and paid over to others[9], of non-taxable income[10], of income on which the tax has been paid[11], of income received and reported in prior years[12], of the proceeds from the sale of previously held assets.[13] Most of the de-

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[2] See *United States* v. *Frank*, 245 F. 2d 284, 287 (3d Cir. 1957); *John W. Lerew*, P. H., T. C. M., 1962-139. *Compare Holland*, 348 U. S. at 127, 75 S. Ct. at 131.

[3] *United States* v. *Frank, supra.* Compare *Holland*, loc. cit., *supra.*

[4] *Ibid.*

[5] *Ibid.* App 936a, 999a.

[6] *E.g.*, App. 937a, 1005a.

[7] *E.g.*, App. 931a-35a.

[8] *E.g.*, App. 1154a-55a.

[9] The assisting fees involved in the present case, see *infra* and App. 1034a-35a.

[10] *E.g.*, interest on municipal bonds.

[11] *E.g.*, petitioner's dividends in the present case (App. 946a-48a); wages subject to withholding.

[12] App. 947a, 1061a-64a, 1093a. See *John W. Lerew, supra.* Compare *Holland*, 348 U. S. at 129, 75 St. Ct. at 132.

[13] *Ibid.* App. 936a, 938a, 998a.

posits to petitioner's accounts were conceded not to be of his professional income which the prosecution was attempting to establish.*

After several years experience with the Commissioner's application of the basic assumption of the bank deposit method in civil tax cases, the Tax Court held in *Denny York*, 24 T.C. 742, 743-44 (1955) that proof of unexplained bank deposits was not sufficient to raise an inference that the deposits were taxable income.** The Commissioner's acquiescence in the *York* decision, Cum. Bull. 1955-2, p. 10, did not solve the problems raised by the use of the bank deposit method. Later in *Estate of Morton Alpirn*, 18 T.C.M. 314, 320 (1959), the Tax Court held that the Commissioner could not rely on unexplained bank deposits as an inference of current income unless there was a showing that the taxpayer himself computed the income on his return from bank deposits or that some item of income had been omitted from the taxpayer's return.†

		1956	*1957*	*1958*
* 1)	Total deposits	$197,290.93	$140,421.37	$160,058.47
2)	Outside receipts [*i.e.*, deposits not claimed to be professional income] 356 F. 2d at 616.	$173,903.77	$114,362.71	$137,158.80"

Thus, 80%-90% of petitioner's deposits were eliminated by the prosecution from any claim of professional income.

** A holding which parallels *Holland*:

"Increases in net worth, standing alone, cannot be assumed to be attributable to currently taxable income." 348 U. S. at 137-38, 75 S. Ct. at 136.

† Neither showing was made below.

In the early uses of something akin to the present bank deposit method, precautions similar to those later developed by the Tax Court were employed. In *Gleckman* v. *United States*, 80 F. 2d 394, 399 (8th Cir. 1935), it was held that the Government sustained its burden by proving that the defendant had a source of income other than that reported in his return and that some of the deposits ascribed to unreported income derived from that source. In *United States* v. *Miro*, 60 F. 2d 58, 59 (2d Cir. 1932), the Government proved that the deposits made to the defendant's accounts were not business income after all expenses had been paid from gross receipts. See also *United States* v. *Venuto*, 182 F. 2d 519, 520-21 (3rd Cir. 1950).

The Court of Appeals cited no cases in reaching its conclusion that the bank deposit method was properly employed in this case and the Government in its brief, which avoided a discussion of the bank deposit method and its assumptions, cited only *United States* v. *Doyle*, 234 F. 2d 788, 793 (7th Cir. 1956), cert. den. 352 U. S. 893, 77 S. Ct. 132 (1956), and *Graves* v. *United States*, 191 F. 2d 579, 582 (10th Cir. 1951). There is language in *Doyle* which appears to approve the basic assumption of the bank deposit method.* However, in *Doyle*, the prosecution subjected it-

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* "Of course, proof under the bank deposit theory is circumstantial in nature, but we know of no reason why such deposits may not be considered in determining income, when there is no evidence that they represent anything other than income." 234 F. 2d at 793. Such a presumption is not based on any statute (if it were, *cf. United States* v. *Romano*, —— U. S. ——, 86 S. Ct. 279 (1965)) for the Commissioner's determination is entitled to a presumption of correctness only in civil proceedings. 348 U. S. at 126, 75 S. Ct. at 130. Such a bald but accurate statement of the basic assumption in a bank deposit computation plainly shows that in a criminal case it places the burden on a defendant after the prosecution does no more than show credits to the defendant's accounts.

self to the discipline of the net worth method and proved a deficiency almost identical to that derived from the bank deposit method. 234 F. 2d at 793-94. See also *Percifield* v. *United States*, 241 F. 2d 225, 229-30 (9th Cir. 1957), and *United States* v. *Frank*, 245 F. 2d 284, 287 (3rd Cir. 1957). In *Graves* there was evidence that specific receipts of income deposited to the defendant's account were omitted from the defendant's return. 191 F. 2d at 582, 583.

Last Term this Court held in *United States* v. *Gainey*, 380 U. S. 63, 85 S. Ct. 754 (1965), that even where there is a statutory presumption of sufficiency of the prosecution's evidence as in 26 U. S. C. §§ 5601(b) (1), (2), the constitutional right to a jury trial includes "the right to have a case withheld from a jury when the evidence is insufficient as a matter of law to support a conviction", 380 U. S. at 68, 85 S. Ct. at 758. The assumption of the bank deposit method, which is not based on any statute, that unidentified credits to a taxpayer's account constitute deposits of current taxable income has been given such weight by the courts that in every reported criminal tax evasion case known to counsel the evidence of deposits has been held sufficient to create a jury issue.

The Second Circuit without the delineation of any principles on which a bank deposit case should be based held that its use in this case was proper:

> "Appellant suggests that there was no evidence from which the jury could have inferred that Item 5, unidentified deposits, was income from professional services. The government relied on the fact that it excluded all possible dividends, on the small size and relative frequency of the deposits, similar to deposits and other income proven to be professional receipts, and on the fact that appellant had patients other

than those whose payments were included in Items 4 and 6, the directly proven items of income. This was sufficient." 356 F. 2d at 618

Counsel realizes that it is not the function of this Court to review purely factual determinations in any case. The facts of this case are adverted to only insofar as they are necessary to illustrate the inferences which have been permitted in bank deposit computations and because they are believed not to be atypical for bank deposit prosecutions, "All possible dividends" were not the only types of exclusions which the Government made and failed to make.* The unidentified deposits attributed to petitioner's professional income said to be "similar to deposits and other income proven to be professional receipts" were also proved by the prosecution to be just as similar to other items which its investigation, so far as it went, had determined were not professional income.** The "fact" that petitioner "had patients other than those whose payments" were proved was established by the introduction of hospital records which showed petitioner as the surgeon for several such patients. However, according to the evidence of witnesses testifying for the prosecution and the defense, there were many instances where no fee was charged and where a fee, although charged, was not paid.† Thus, in this case where the prosecution itself proved that at least 80% to 90% of petitioner's deposits were not professional income††, the prosecution was still allowed the benefit of the basic assumption of the bank deposit method that unidentified deposits

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* (*E.g.*, App. 938a, 1035a-44a).

** (*E.g.*, App. 980a-1022a).

† (*E.g.*, App. 300a-301a, 1509a-10, 1638a).

‡ See footnote, p. 39, *supra*.

in petitioner's accounts represented current taxable *professional* income, the tax on which he could properly be found to have willfully evaded.

The vice of the assumption basic to the bank deposit method goes even further, for it becomes the only element which the Government must prove. The Court below held on, we submit, a misreading of this Court's decision in *Holland*, that where the Government proves deposits which it cannot identify but which it claims are professional income and which exceed the reported amount of that type of income for more than one year, it has proven wilfulness because "consistent substantial understatement is enough", 346 F. 2d at 618.

It is respectfully submitted that to allow the Government to rely on the assumption inherent in a bank deposit computation for any and for all the elements required under 26 U. S. C. § 7201 deprives petitioner of due process and is an infringement of his right to a jury trial of the elemental issues.

B. Safeguards necessary for the use of the bank deposit method in a criminal case.

Since this Court's decision in *Holland* v. *United States*, *supra*, the Courts of Appeals which have sustained the use of the bank deposit method in a criminal tax evasion trial have done so on the assumption that it is sufficiently similar to the net worth authorized by *Holland*. See *United States* v. *Doyle*, 234 F. 2d at 793; *Bostwick* v. *United States*, 218 F. 2d 790, 793, 794 (5th Cir. 1955); *United States* v. *Frank*, 245 F. 2d 284, 287 (3d Cir. 1957), affirming 151 F. Supp. 866, 868 (W. D. Pa. 1956). These Courts have held that the prosecution must show "a thorough investigating analysis of the deposits . . . as was the case here and as

is required generally" (*Doyle*, 234 F. 2d at 793), and "an adequate investigation of the deposits . . . by Government agents in order to negative the likelihood that the deposits arose from some non-taxable source" (*Frank*, 151 F. Supp. at 868), since the bank deposit method and the net worth method are each "obviously a method of proving an offense by circumstantial evidence" (*Frank*, 245 F. 2d at 287). The investigation which the Government is required to demonstrate includes the investigation of "relevant leads furnished by the tax-payer—leads reasonably susceptible of being checked, which, if true, would establish the taxpayer's innocence", *Holland* v. *United States*, 348 U. S. at 135-36, 75 S. Ct. at 135. Even where a civil tax deficiency is concerned, the Tax Court has applied the same rule to the bank deposit method of proof. *William J. Powers, Jr.*, 21 T.C.M. 17 (1962).

The trial court below held that the Government was obligated in a bank deposit computation to investigate leads supplied by the taxpayer because "the bank deposits method is equally fraught with the very danger which lead to the development of the leads rule" (App. 92a-93a). On appeal, however, the Second Circuit appeared to be in some doubt as to whether or not the leads rule did apply to a bank deposit case, in view of the Government's argument that it should not. 356 F. 2d at 617.

The doubt expressed by the Second Circuit as to the applicability of the leads rule to "bank deposit" cases may so influence lower courts as to result in their refusal to consider a failure to follow leads in cases of this type. This would result in the application of a method of proof in criminal cases which is at least as dangerous as the net worth method without the safeguards this Court found necessary in *Holland*.

The Court of Appeals thought it unnecessary to reach that issue since it agreed with the trial court "that the lateness and vagueness of the leads here supplied" (*Ibid.*) justified the Government's failure to investigate those leads. In so holding, the courts below made a ruling which effectively eliminates the safeguard of the leads rule in both net worth and bank deposit cases, assuming that the use of the bank deposit method is constitutionally sound.

This Court held in *Holland* that where the Government relies in a tax evasion case on a method which at best deals with only approximations and circumstantial inferences:

> "the cogency of its proof depends upon its effective negation of reasonable explanations by the taxpayer inconsistent with guilt." 348 U. S. at 135, 75 St. Ct. at 135.

Holland quite clearly stated the consequences of a failure to investigate leads:

> "When the Government fails to show an investigation into the validity of such leads, the trial judge may consider them as true and the Government's case insufficient to go to the jury." 348 U. S. at 136, 75 S. Ct. at 135.

The basis for the rule and the consequences attendant on the Government's failure to observe it were also clearly stated in *Holland*:

> "This should aid in forestalling unjust prosecutions, and have the practical advantage of eliminating the dilemma, especially serious in this type of case, of the accused's being forced by the risk of an adverse verdict to come forward to substantiate leads which he had previously furnished the Government. It is

a procedure entirely consistent with the position long espoused by the Government, that its duty is not to convict but to see that justice is done." 348 U. S. at 136, 75 S. Ct. at 135-36.

In the present case petitioner supplied Government agents with leads which were not merely inconsistent with guilt. Investigation of those leads would have demonstrated that there was no unreported income.*

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* The Government claimed as unreported professional receipts:

1956	*1957*	*1958*
$11,071.66 (Ex. 502; App. 2121a)	16,280.66	$15,059.23

which were completely offset by the uninvestigated assisting fees which paid:

1956	*1957*	*1958*
$12,102.00 (356 F. 2d at 616, Chart, line 11)	$16,375.00	$15,269.00

The accountant who prepared petitioner's returns during the years in question testified that from the figure petitioner gave him as his professional receipts for each year, the accountant made further deductions based on some of petitioner's personal checks made payable to assisting doctors (App. 242a-44a, 257a-58a, 263a-64a). These amounts, $720 for 1956, $1,195 for 1957, and $1,200 for 1958, the only assisting fees the Government allowed in its computation (Ex. 502, App. 2121a) until the very end of the trial, appear on line 9 of the chart in the Court of Appeals opinion. 346 F. 2d at 616. Because neither the accountant nor petitioner's counsel could determine to what assisting fees the accountant was referring, at the trial petitioner claimed only the amount of assisting fees set forth in this footnote which are shown as line 11 of the Court of Appeals chart, *ibid.*, not the total of lines 9 and 11 as the Court of Appeals chart may seem to imply.

Petitioner's returns reflected only the fees which he collected and retained as his own, not the fees collected for and paid over to assisting doctors. It was conceded at the trial that this was a proper practice of reporting his professional income. See *Frelbro Corp.* v. *C. I. R.* 315 F. 2d 784, 787 (2d Cir. 1963) and cases there cited. It was also conceded by the Government, 356 F. 2d at 616, and its agent witnesses (App. 227a, 1027a) that assisting fees collected by petitioner for other doctors and paid over to them were a necessary offset against the Government's bank deposit calculation of unreported patients' fees.

This Court in *Holland* v. *United States, supra,* prescribed three criteria for determining what type of leads the Government is required to investigate:

> "[1] relevant leads furnished by the taxpayer—[2] leads reasonably susceptible of being checked, which, if true, [3] would establish the taxpayer's innocence." 348 U. S. at 135-36, 75 S. Ct. at 135.

The first and third criteria are conceded in this case. Payment of assisting fees were relevant because admittedly they had to be offset against any claim of unreported professional income. They established the taxpayer's innocence because the amounts paid, as demonstrated at the trial, completely offset the amount of income claimed by the Government to have been unreported.

Were petitioner's leads "reasonably susceptible of being checked"? The Government has never contended it could not have made an investigation of assisting fee payments on the leads supplied. The Government showed that when it wished to contact the affiant doctors for an improper

purpose (Point 3, *infra*), it could do so in a few days.* The trial court found that, on the basis of the information supplied, the prosecution could have fully explored the payment of assisting fees before indictment (App. 1890a, 1893a). What then of the holding by the Courts below that petitioner's leads were vague and late?** 356 F. 2d at 617. Petitioner submits that the holding is a return to hypertechnical rules of pleading and practice which have long been abandoned even in civil practice. See *Foman* v. *Davis*, 371 U. S. 178, 181-82, 83 S. Ct. 227, 229-30 (1962). Even though petitioner's leads demonstrably fulfilled the requirements of *Holland*, the Courts below refused to impose the *Holland* sanctions because they held the leads

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* It had six months between the receipt of the leads with counsel's letter and the return of the indictment (Ex. P, App. 2078a; App. 1a) and nearly four years from the time the lead was first given in 1959.

Because the purpose of the *Holland* leads rule is to forestall unjust prosecutions, 348 U. S. at 136, 75 S. Ct. at 135, the required investigation should be conducted prior to return of an indictment which would be the latest time prosecution could be said to commence. See *DiBella* v. *United States*, 369 U. S. 121, 131, 82 S. Ct. 654, 660 (1962).

** The suggestion by the Court of Appeals that the Government was not required to investigate these leads because of "counsel's unfulfilled promise to provide more definite information", 356 F. 2d at 617, constituted a further erosion of the *Holland* rule. Counsel's letter of December 3, 1962 opened with a request for a conference to discuss these matters (App. 2078a, 2080a) and closed with one (App. 2088a), "I shall await further word from you on this matter" (App. 2089a). The requested conference was not granted. To hold that the prosecuting agency charged with investigating leads under *Holland* may terminate its obligation to investigate by a refusal to listen is to allow it to exempt itself from sanctions in every case.

formally defective by some standard not stated. *If such technical rules of pleading and procedure are applied to leads instead of an assessment of their practical effect it will provide government agents with an incentive to forego investigation of the merits of leads for a merely formal attack on their sufficiency as pleadings.*

Holland did not attempt to establish any requirement of detail for a lead. This lack was not through inadvertence but out of the realization that any such rigid requirement would defeat the basic policy of the rule. As this Court observed in *Holland*:

> "Although it may sound fair to say that the taxpayer can explain the 'bulge' in his net worth, he may be entirely honest and yet unable to recount his financial history." 348 U. S. at 128, 75 S. Ct. at 131.

In no other Circuit has a lack of fiscal detail in a lead been held to relieve the Government of its obligation to investigate. See *Merritt* v. *United States*, 327 F. 2d 820, 821, 823 n. 8 (5th Cir. 1964), adhered to 329 F. 2d 757, 334 F. 2d 759, where there was a reference to "some other assets", not included in the Government's opening net worth, which the taxpayer was not able to specify at the trial. In *Fairchild* v. *United States*, 240 F. 2d 944, 948 (5th Cir. 1958), the Court of Appeals directed judgment for the taxpayer where the investigating agents "at no time during the investigation or thereafter did . . . make any specific effort to find out what he had in the [safety deposit] box", 240 F. 2d at 948. In *William J. Powers, Jr.*, 21 T. C. M. 17 (1962) the Tax Court found for the taxpayer on the Government's failure to investigate leads to 26 patrons of a hotel, owned by the taxpayer's mother-in-law, who could be

expected to testify to the success of that business which could have been a source for gifts to the taxpayer's wife.

But the Government was required to investigate the leads in the present case for yet another reason. The Government was required to determine the amount of the assisting fees in order to compute petitioner's own professional income since, admittedly, assisting fees paid by petitioner had to be offset against any amount of gross professional income he received from patients, which would include his own fees and the fees of the assisting doctors. As the Government had been informed through the leads that assisting fees were paid, its failure to undertake an investigation to determine the amounts rendered its computations incomplete and too inaccurate for submission to the jury. *Bryan* v. *United States supra; United States* v. *Fenwick, supra,* cited in *Holland* v. *United States,* 348 U. S. at 126, 75 S. Ct. at 131.

In view of the investigation approved by this Court in *Holland,* which covered "several states and over a score of years," 348 U. S. at 136, 75 S. Ct. at 136, no reason appears why the Government could not have spared a few days, or even a few weeks, journeying only from Manhattan to the Bronx, to check the much more substantial leads supplied in the present case.

While the leads question was advanced to the Court in a motion for judgment of acquittal, denial of that motion placed petitioner's counsel in serious dilemma. The fees paid by petitioner to the assisting doctors became the central issue at the trial. Although it had failed to investigate the leads to those payments, the Government had knowledge of that defense from the leads and anticipated the defense by raising a spurious issue of credibility on its direct case (App. 37a-41a). In addition, Government

agents testified at some length about the details—and supposed care—of their investigation in computing petitioner's professional income by the bank deposit method (*e.g.*, App. 926a-56a, 968a-74a). In an attempt to minimize the prejudice to petitioner's case, counsel requested that the jury be charged, substantially in the language of the *Holland* opinion, that the Government had a duty to investigate a taxpayer's leads (App. 2064).* This request was denied (App. 1915a).

The rulings below make a legalistic snare out of the leads rule which was intended by this Court as a constitutional safeguard.

C. The prosecutor's admission that the bank deposit computation was erroneous.

On summation, the prosecutor admitted that there was no question appellant had paid the assisting doctors more fees than the Government had allowed as offsets against its bank deposit computation of his professional income (App. 1976a). The prosecutor also admitted that the Government was not able to determine how much petitioner paid to those other doctors (Ibid.). This latter admission was not surprising in view of the Government's failure to investigate the leads. At the time these admissions were made, there were only two possible amounts of assisting fees which the jury could find: either the small amount the Government had previously admitted were paid (Ex. 502; App. 2121a)**, or the amounts established

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* There is authority for the submission of this type of issue to the jury. See Mathes and Devitt, Federal Jury Practice and Instructions (1965), p. 350.

** See Point 2-B, *supra*.

by the defense which were a complete offset to the Government's claim of unreported professional income (Ex. AAP; App. 2119a). There was no basis for a middle ground determination as these were the only two contentions before the jury. See *Richmond Television Corp.* v. *United States,* 345 F. 2d 901, 903, 907 (4th Cir. 1965).

This Court has held that the admission of a party on an issue crucial to his case should be treated as binding. *Oscanyan* v. *W. R. Arms Co.,* 103 U. S. 261, 263 (1881); *Best* v. *District of Columbia,* 291 U. S. 411, 54 S. Ct. 487 (1934); see also 9 Wigmore on Evidence (3d Ed. 1950) §2594(2). The Second Circuit held that the prosecutor's admissions were not destructive of his case because,

> "it was not necessary for the government to prove that a given amount was paid, as long as it bore its burden of disproving the defense and showed substantial understatement of income; and even if the prosecutor's statement did cast some doubt on the government's case, the doubt could be found to concern merely the precise amount, not the existence of a substantial understatement." 356 F. 2d at 618.

The Second Circuit cited as authority this Court's decision in *United States* v. *Johnson,* 319 U. S. 503, 517, 63 S. Ct. 1233 (1943), which held that:

> "To require more or more meticulous proof than this record discloses that there were unreported profits from an elaborately concealed illegal business, would be tantamount to holding that skilful concealment is an invincible barrier to proof." 319 U. S. at 517-18, 63 S. Ct. at 1240.

The nature of the enterprise and the proof in *Johnson* necessarily rendered the amount of unreported income there

established somewhat inexact. That, as other Circuits have held, is far different from a situation where the prosecutor or a Government agent admits that the Government has failed to prove an item essential to its computation of income by a circumstantial method and further admits that he is unable to determine what the impact of that item might be on the defendant's income. *Merritt* v. *United States, supra; Bryan* v. *United States, supra; United States* v. *Fenwick, supra; United States* v. *Caserta,* 199 F. 2d 905, 908 (3d Cir. 1952); see *Flemister* v. *United States,* 260 F. 2d 513, 517 (5th Cir. 1958). The Second Circuit's holding, which injects further doubt into a circumstantial method of proof already dangerously vague, raises serious questions of due process.

D. The Government's failure to traverse the assisting fee defense.

Because the Government failed to investigate the leads to the payment of assisting fees, petitioner was "forced by the risk of an adverse verdict to come forward to substantiate leads which he had previously furnished the Government", 348 U. S. at 136, 75 S. Ct. at 135-36. The defense case, as already noted *supra,* consisted of proof through documents and testimony of assisting doctors that petitioner had received on behalf of and paid over to those assisting doctors fees from common patients in amounts which completely eliminated the Government's claim for each year. Although the Second Circuit correctly observed that this defense was not rebutted by the prosecution, and that the burden of persuasion on the whole case rested on the prosecution, 356 F. 2d at 617, it, nevertheless, concluded that a collateral issue of credibility raised by the Government was sufficient to create a jury

question*, 356 F. 2d at 618. That holding is in sharp conflict with the decision of the First Circuit in *Small* v. *United States*, 255 F. 2d 604, 607 (1st Cir. 1958). See also *Ralph Romine*, 25 T.C. 859, 871-72 (1956), and *Arthur M. Slavin*, 43 B.T.A. 1100, 1106-07 (1941). In *Small*, as below, the Government failed to investigate, there, the sale of an asset alleged to have resulted in unreported taxable gain. The defendant produced evidence, independent of his own testimony, which showed that no gain had been realized from the questioned transaction, 255 F. 2d at 607. As in the present case, the Government relied upon a collateral issue of credibility.** The First Circuit held that where the taxpayer comes forward with substantial evidence,

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* The so-called issue of credibility was entirely spurious. See petition for rehearing filed in the Second Circuit at pp. 6-11. In sum, it amounted to the following: Because the prosecution had received the affidavits of the assisting doctors and was thus informed of the nature of the defense, it attempted to undercut and anticipate that defense on its own case before that defense was even presented to the jury by the following type of showing: Hospital records for a number of patients did not list an assistant surgeon and patients testified they did not know that part of their fee to Dr. Procario was to be paid over to another doctor for his assistance. In fact, the defense did not claim that assisting fees were paid in every case and an assisting doctor whose services were medical rather than surgical would not appear on the operating records as an assisting surgeon. Patients' testimony as to their 'knowledge' of assisting fee payments was elicited by the prosecution without regard to whether there was an assisting doctor or any claim of an assisting fee. Moreover, whether or not patients "knew" that Dr. Procario paid over part of their fee to assisting doctors did not and could not affect or contradict the testimony of the assisting doctors that they had received payments from Dr. Procario.

** A special agent of the Internal Revenue Service testified that during his investigation the defendant, Small, had admitted that there was a substantial difference between the original cost and the selling price of the asset in question. 255 F. 2d at 606.

> "the burden is then on the government to supply evidence from which it could be inferred that either the claimed expenditures were not made or that they were not sufficient to offset the net return to the seller." 255 F. 2d at 607.

Noting that there, as here, the Government did not rebut the taxpayer's evidence, the First Circuit held:

> "The Government has thus not borne its burden of proving that the defendant gained taxable income from the sale of his house and consequently the trial court committed error in submitting to the jury the issue of whether or not there was a profit on the house." (Ibid.)

3. The exclusion of attempts to intimidate defense witnesses.

The trial court excluded (App. 1201a, 1276a) petitioner's proof that the prosecution had attempted to intimidate his assisting doctor witnesses by spurious grand jury subpoena and defamatory press release as shown by *Application of Bruno,* M 11-188 (6/9/23/64), Government appeal withdrawn, Docket No. 29023 (2d Cir. 10/30/64).

A year after the indictment was returned, the prosecutor caused to be served upon the doctors whose affidavits petitioner had submitted to the Department of Justice subpoenas of the United States District Court for the Southern District of New York (Br. App. 20a-28a, 73a-82a). These subpoenas informed the assisting doctors that they were to appear in the office of the Assistant United States Attorney prosecuting the case against petitioner in connection with a supposed grand jury investigation of obstruction of justice and warned them they were "not to depart the Court without leave thereof, or of the United States At-

torney", and that for failure to attend they would be "deemed guilty of contempt of Court and liable to penalties of the law" (Ibid.). Petitioner and the assisting doctors moved in the District Court to quash these subpoenas on the ground that they were abusive since there was no grand jury inquiry and that they were a coercive weapon of the prosecutor, enabling him to intimidate defense witnesses and discredit the defense (Br. App. 8a, 14a, 48a). *Application of Bruno, supra.* During the pendency of the proceeding to quash, the prosecutor caused to be published in the New York Times a press release naming the doctors who had moved to quash, defaming them by implication as "fee-splitters", and stating that the Federal Government sought to force them to appear before a grand jury "investigating a possible conspiracy to obstruct justice" (Br. App. 5(b))*.

The prosecution sought to justify these actions not as a belated interest in the assisting fee leads but on the allegation that hospital records reflecting surgeries by petitioner, assisted by the other doctors, were missing (Br. App. 17a). The District Court quashed the subpoenas as abusive and coercive, holding that the claimed obstruction of justice investigation was merely a guise (Br. App. 1(b), 3(b)). As the Second Circuit was about to file a decision on the Government's appeal in *Bruno* (App. 27a), the Government withdrew its appeal, stating that the "missing" hospital records "had actually been turned over to an Internal Revenue Agent who was working on a case unrelated to the Procario case" (App. 25a).

In its decision below, the Second Circuit stated that all this was solely a matter for disciplinary action by the

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* "Br. App. —b" pagination refers to Appellee's Appendix (bound with the brief) in *Bruno*.

Court and not an occasion for confusing petitioner's trial with a collateral matter. Compare the earlier opinion by Judge Swan, the Judges Hand concurring, in *United States* v. *Remington,* 191 F. 2d 246, 251 (2d Cir. 1951), which, likening prosecutorial efforts such as those in *Bruno* to spoiliation of documents, held them "affirmative evidence of the weakness of the prosecution's case." 191 F. 2d at 251.* The Court of Appeals for the District of Columbia Circuit has ruled that spurious grand jury process identical to that employed in *Bruno* was an "oppressive tool", *Durbin* v. *United States,* 221 F. 2d 520, 522 (D. C. Cir. 1954).

The prosecution is regularly allowed to introduce collateral evidence that an accused has attempted to intimidate or otherwise impair the effectiveness of witnesses for the prosecution. See, e.g., *Hood* v. *United States,* 23 F. 2d 472, 475 (8th Cir. 1927), cert. den., 277 U. S. 588, 48 S. Ct. 436; *United States* v. *Rose,* 113 F. Supp. 775, 778 (M. D. Pa. 1953), rev'd. on other grounds, 215 F. 2d 617 (3rd Cir. 1954); *Harvey* v. *United States,* 215 F. 2d 330, 331-32 (D. C. Cir. 1954); *United States* v. *Freundlich,* 95 F. 2d 376, 378-79 (2d Cir. 1938). Is such evidence available only to the prosecution? This Court, dealing with an analogous area in *United States* v. *Shotwell Manufacturing Co.,* 355 U. S. 233, 244, 78 S. Ct. 245, 252 (1957) held:

> "The fair administration of justice is not such a one-way street." 355 U. S. at 244, 78 S. Ct. at 252.

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* Petitioner certainly agrees with the statement in *Remington* that it would not be relevant to show "that a grand jury was called for the express purpose of intimidating witnesses." *Ibid.* As the District Court found in *Bruno,* there was no grand jury called for any purpose.

The trial court's exclusion of evidence of the prosecution's attempts to intimidate and coerce the assisting doctors was particularly prejudicial in view of a special agent's testimony for the prosecution that the assisting doctors would not talk to him (a veiled reference to their lawful resistance to the abusive "grand jury" subpoenas), plainly implying that the doctors were evasive (App. 1199a). That, said the special agent, was why he had not investigated the payment of assisting fees (*Ibid.*) although this incident occurred a year after the indictment was returned.

CONCLUSION

For the reasons stated, it is respectfully prayed that this petition be granted.

Respectfully submitted,

LOUIS BENDER,
170 Broadway
New York, N. Y.
Counsel for Petitioner.

LLOYD A. HALE,
New York City
Of Counsel.

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 164—September Term, 1965.

(Argued December 8, 1965 Decided February 23, 1966.)

Docket No. 29843

UNITED STATES OF AMERICA,

Appellee,

—v.—

ANGELO PROCARIO,

Appellant.

Before:

LUMBARD, *Chief Judge,*
FRIENDLY and SMITH, *Circuit Judges.*

Appeal from judgment of conviction and sentence to cumulative fines and concurrent terms of imprisonment after conviction on trial to the jury in the United States District Court for the Southern District of New York, Edmund L. Palmieri, *District Judge,* on three counts of attempted income tax evasion, 26 U. S. C. 7201. Affirmed.

Appendix A

PETER K. LEISURE, Assistant United States Attorney for the Southern District of New York (Robert M. Morgenthau, U. S. Attorney for the Southern District of New York, Bernard W. Nussbaum, Robert G. Morvillo, Otto G. Obermaier and John E. Sprizzo, Asst. United States Attorneys, on the brief), *for appellee.*

LOUIS BENDER and LLOYD A. HALE, New York, N. Y., *for appellant.*

SMITH, *Circuit Judge*:

Dr. Angelo Procario appeals from a conviction, on a jury verdict in the United States District Court for the Southern District of New York, Edmund L. Palmieri, *Judge,* on three counts of attempting to evade federal income tax, 26 U. S. C. §7201, in 1956, 1957 and 1958. He was sentenced to imprisonment for a year and a day on each count, running concurrently, and to a $3,000 fine on each count, as well as one-third costs. We find no error and affirm the judgment.

Principally at issue was appellant's professional income for 1956-1958 and the extent to which apparent income was reduced by payments to assisting doctors. The government relied for proof partly on direct evidence from patients and their cancelled checks, and partly on the bank deposit method, modified so as to yield the rest of appellant's professional income. This resulted in computation on income from three sources: first, 249 checks deposited, from patients or medical services on account of patients; second, 82 checks not deposited; third, deposits not specifically identified as representing other income, yet inferentially

Appendix A

income. The following table reflects the government's calculations:

	1956	*1957*	*1958*
1) Total deposits	$197,290.93	$140,421.37	$160,058.47
2) Outside receipts	–173,903.77	–114,362.71	–137,158.80
3) 1 less 2	$ 23,387.16	$ 26,058.66	$ 22,899.67
4) 249 checks	– 7,338.00	– 13,203.78	– 11,493.50
5) Net—420 unidentified deposits	16,049.16	12,854.88	11,406.17
6) 82 checks not deposited	8,944.50	12,227.00	14,123.66
7) 4, 5 and 6—total professional receipts	$ 32,331.66	$ 38,335.66	$ 37,023.33
8) Reported receipts	– 21,260.00	– 22,055.00	– 21,964.10
9) Reference fees paid	– 720.00	– 1,195.00	– 1,200.00
10) Total unreported	$ 10,351.66	$ 15,085.66	$ 13,859.23
11) Defendant's claimed total assisting and reference fees paid	$ 12,102.00	$ 16,375.00	$ 15,269.00

Item 9 above represents reference fees which the government conceded were paid to doctors. (The parties are agreed that it is proper reporting procedure to show receipts net of amounts paid to other doctors for assistance or reference. Hence, Item 8 above was reported net of Item 9, or similar amounts.)

Six months prior to the filing of the indictment, which came within a few days of the time when Count One (1956) would have become time-barred, appellant's counsel sent a letter to the government alleging that "many thousands of dollars" received by appellant from patients were turned over to named assisting doctors; appellant included with his letter affidavits from ten doctors, which, however, did not specify the amounts so paid. Counsel for appellant, in his

letter to the Attorney General dated December 3, 1962 stated as follows:

> "The proof is incomplete only in the sense that the affidavits do not reflect the specific sums received. Shortness of time prevented the accumulation of this additional evidence, which we hope to have shortly. These payments do not represent insubstantial amounts. Over this period in question, from information supplied to me, the payments amount to many thousands of dollars."

No further information as to specific amounts was furnished. The government did not act on the letter and affidavits until after the indictment was filed. At the trial appellant introduced doctors and their records to establish that the alleged unreported income was paid over to other doctors.

Appellant's first claim is grounded on *Holland* v. *United States,* 348 U. S. 121 (1954), requiring that where the government rests its case on circumstantial evidence under the net worth method of computation, it must follow up "leads" furnished by a taxpayer or the trial judge may take the lead as true and direct an acquittal on that basis. Appellant's argument is that the same requirements should apply in a case based on the bank deposit method, and that the District Court should have acquitted appellant or at least charged the jury that the failure to follow up leads should be construed against the government. Appellant claims that the bank deposit method sufficiently resembles the net worth computation in its speculative character that *Holland* should apply.

The lead, of course, was the letter and affidavits. The District Court concluded that *Holland* would apply to a

bank deposit case, but that in view of the late date the lead was supplied, "on the eve of indictment," no judgment of acquittal was required.

The government contends that *Holland* should not apply to the use of the bank deposit method, since many of the dangers of the net worth method alluded to in *Holland* are non-existent in this case. We find that we need not determine the necessity for applying the "leads" doctrine to a bank deposit method case, however, for we agree with Judge Palmieri that the lateness and vagueness of the leads here supplied, coupled with counsel's unfulfilled promise to provide more definite information, justified the government's failure to follow them up more thoroughly prior to indictment.

Appellant argues that it was error to go to the jury in the light of the unrebutted evidence offered by the defense of assisting and reference fees paid greater than alleged unreported income. Appellant claims this evidence was unrebutted and relies on *Dyer* v. *MacDougall,* 201 F. 2d 265 (2 Cir. 1952). The government claims that it does not have the burden of proof as to the issue presented by this defense, citing *United States* v. *Bender,* 218 F. 2d 869 (7 Cir.), cert. den. 349 U. S. 920 (1955) and *United States* v. *Stayback,* 212 F. 2d 313 (3 Cir. 1954), cert. den. 348 U. S. 911 (1955). It is questionable, however, whether these cases hold more than that the government has no burden of going forward with evidence to negate unreported deductions; in any event we see no reason why, under the circumstances here, the burden of persuasion on the whole case did not rest on the prosecution. On the other hand, the *Dyer* case does not assist the appellant; it dealt with a situation where the proponent's witnesses had testified against him and the only basis for escaping a directed ver-

dict for the opponent was the possibility that their demeanor would convince the trier of the facts that the truth was the opposite of what they said. Here there was ample conflicting evidence to create a jury issue. The assisting doctors testified, with one exception, that their fees were usually 40-50% of the total bill to the patient. Yet the government showed examples of direct payment by patients to each doctor, where the arrangement was at most 25%. The doctors testified that most of their patients knew or should have known that their payments to appellant included the fees due assisting doctors, yet the government showed that 95% of the patients were unaware of this. Hospital "operative Records" were used by appellant to establish this defense; yet in one-half the cases listed there no assisting surgeon was noted except the resident, who was barred from receiving fees. Among those cases were some as to which some doctors testified they assisted. Finally, the books and records of the doctors were suspect, since the jury could believe that where appellant's name appeared there had originally been blanks, and his name was filled in later to aid his defense.

Appellant argues that the admission by the prosecutor in summation that the government knew some cash was paid to the doctors, but could not show how much, destroyed his case and invited the jury to speculate. However, it was not necessary for the government to prove that a given amount was paid, as long as it bore its burden of disproving the defense and showed substantial understatement of income; and even if the prosecutor's statement did cast some doubt on the government's case, the doubt could be found to concern merely the precise amount, not the existence of a substantial understatement. The government need not prove the exact amount. *United States* v. *John-*

son, 319 U. S. 503, 517 (1943). The court correctly so charged.

Appellant suggests that there was no evidence from which the jury could have inferred that Item 5, unidentified deposits, was income from professional services. The government relied on the fact that it excluded all possible dividends, on the small size and relative frequency of the deposits, similar to deposits and other income proven to be professional receipts, and on the fact that appellant had patients other than those whose payments were included in Items 4 and 6, the directly proven items of income. This was sufficient.

Contrary to appellant's claim, there was independent evidence of wilfulness: taking cash receipts, even when the patient wished to pay by check, and the withholding of full records from the accountant. And the amounts alleged to have been understated were substantial and for at least three consecutive years. While there must be substantial independent evidence of wilfulness, other than the mere understatement of income, consistent substantial understatement is enough. *Holland* v. *United States,* 348 U. S. 121, 139 (1954).

Appellant argues he was improperly denied the right to introduce evidence that the prosecutor intimidated witnesses by serving spurious grand jury subpoenas on the doctors. Appellant specifically sought, while a Special Agent was testifying for the government, to introduce the matter of the subpoenas. In *United States* v. *Remington,* 191 F. 2d 246 (2 Cir. 1951), on which appellant relies, the court said that the only proper way to bring out intimidation is to "examine such witnesses as it claims were intimidated and prove, if it can, that such was the fact," and that evidence of an intimidating purpose in calling a grand

jury would not be admissible anyway. No attempt was made on the examination of the witnesses to show that they were in fact intimidated. We find no error in the exclusion of the evidence on the subpoenas. If the grand jury subpoenas were misused, it was a matter for disciplinary action by the Court, and not an occasion for confusing this trial with such a collateral matter.

Appellant alleges suppression of Lo Casto's (his accountant's) grand jury testimony. The only issue here is whether the testimony was in fact turned over to the court, and this was properly resolved against the claim.

Appellant's final point is that a new trial or hearing should have been ordered based on the jury's misconduct, discussion of evidence and expression of views to each other during the course of the trial, brought to the court's attention by the affidavit of an alternate juror. The alleged misconduct took place prior to deliberation on the verdict. The alternate juror, of course, was not present at the jury's deliberations. Appellant distinguishes this from the conventional impeachment situation by the fact that the affidavit makes no reference to the deliberations. Nevertheless, the same policy considerations prevent inquiry here, or the alternate juror will become an unending source of uncertain verdicts. "The jurors themselves ought not be subjected to harassment; the courts ought not be burdened with large numbers of applications mostly without real merit; the chances and temptations for tampering ought not be increased; verdicts ought not be made so uncertain." *United States* v. *Crosby*, 294 F. 2d 928, 950 (2 Cir. 1961); see *McDonald* v. *Pless*, 238 U. S. 264, 267 (1915).

The judgment is affirmed.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-third day of February one thousand nine hundred and sixty-six.

Present:

HON. J. EDWARD LUMBARD, Chief Judge,
HON. HENRY J. FRIENDLY,
HON. J. JOSEPH SMITH,
Circuit Judges.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

ANGELO PROCARIO,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

/s/ A. DANIEL FUSARO
Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

vs.

ANGELO PROCARIO,

Apellant.

Petition for Rehearing In Banc

Louis Bender, New York, N. Y., for appellant.

No active circuit judge having requested that the case be reheard in banc, the petition is denied.

/s/ J. EDWARD LUMBARD
Chief Judge

8 April 1966

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

vs.

ANGELO PROCARIO,

Apellant.

Petition for rehearing; stay of mandate pending determination by the Supreme Court of the United States on a petition for certiorari.

Louis Bender, New York, N. Y., for appellant.

Petition denied; motion to stay mandate denied.

J. E. L.
H. J. F.
J. J. S.
U.S.C.J.J.

Apr. 8, 1966

APPENDIX E

SUPREME COURT OF THE UNITED STATES

No. ——, OCTOBER TERM, 1965

ANGELO PROCARIO,

Petitioner,

vs.

UNITED STATES

ORDER

UPON CONSIDERATION of the application of counsel for petitioner, the United States not objecting,

IT IS ORDERED that the execution and enforcement of the mandate of the United States Court of Appeals for the Second Circuit in the above-entitled case be, and the same is hereby, stayed pending the timely filing and disposition of a petition for writ of certiorari in this case. Should the petition for certiorari be denied, this stay is to terminate automatically. In the event the petition for writ of certiorari is granted, this stay is to remain in effect pending the issuance of the mandate of this Court.

/s/ JOHN M. HARLAN
Associate Justice of the Supreme
Court of the United States

Dated this 21st
day of April, 1966.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statute involved	2
Statement	3
Argument	8
Conclusion	16

CITATIONS

Cases:

Beard v. *United States*, 222 F. 2d 84, certiorari denied, 350 U.S. 846	12
Consolidated Gas & Equipment Co. of America v. *Carver*, 257 F. 2d 111	11
Gleckman v. *United States*, 80 F. 2d 394, certiorari denied, 297 U.S. 709	12
Graves v. *United States*, 191 F. 2d 579	12
Holbrook v. *United States*, 216 F. 2d 238, certiorari denied, 349 U.S. 915	12
Holland v. *United States*, 348 U.S. 121	13, 14
Hyde v. *United States*, 225 U.S. 347	9
Kirsch v. *United States*, 174 F. 2d 595	12
McDonald v. *Pless*, 238 U.S. 264	9, 10
Photostat Corporation v. *Ball*, 338 F. 2d 783	11
Rubenstein v. *United States*, 227 F. 2d 638	11
Stinnett v. *United States*, 173 F. 2d 129, certiorari denied, 337 U.S. 957	12
United States v. *Alker*, 180 F. Supp. 661	11
United States v. *Crosby*, 294 F. 2d 928, certioriari denied *sub nom. Nittleman* v. *United States*, 368 U.S. 984	9

219-492—66——1

Cases—Continued
United States v. *Furlong*, 194 F. 2d 1, certiorari denied, 343 U.S. 950 ..... Page 10
United States v. *Johnson*, 319 U.S. 503 13
United States v. *Nunan*, 236 F. 2d 576, certiorari denied, 353 U.S. 912 12
United States v. *Venuto*, 182 F. 2d 519 12
Washington Gas Light Co. v. *Connolly*, 214 F. 2d 254 11
Statute:
Internal Revenue Code of 1954, Sec. 7201 (26 U.S.C. 1958 ed., Sec. 7201) 2, 3

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 1284

ANGELO PROCARIO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. 1a–8a) is reported at 356 F. 2d 614. The opinion of the district court (R. 86a–112a),[1] denying petitioner's post-trial motions, is not officially reported.

JURISDICTION

The judgment of the court of appeals was entered on February 23, 1966 (Pet. 9a), and a petition for rehearing was denied on April 8, 1966 (Pet. 10a). The petition for a writ of certiorari was filed on May

[1] "R." refers to petitioner's appendix, and "Supp. R." to the government's appendix, in the court of appeals.